SUPREME COURT OF THE UNITED STATES.

No. 57.

JAMES DUNDAS, MORDECAI D. LEWIS, SAMUEL W. JONES, ROBERT L. PITFIELD, AND ROBERT HOWELL, APPELLANTS,

vs.

ANNE HITCHCOCK.

APPEAL FROM THE CIRCUIT COURT, UNITED STATES, FOR SOUTHERN DISTRICT OF ALABAMA.

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UNITED STATES OF AMERICA,
Southern district of Alabama.

Pleas had before the honorable the circuit court of the United States, for the fifth judicial circuit and the southern district of Alabama, at a term thereof began and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and forty-nine. The honorable John Gayle, judge of said court, presiding.

Be it remembered, that heretofore, to wit, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and forty-seven, Anne Hitchcock filed in said court her bill of complaint against James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howel, in the words and figures following, to wit:

To the judges of the circuit court of the United States, for the southern district of Alabama, at Mobile.

Anne Hitchcock, a citizen of the State of Alabama, residing at Mobile, in said State, and widow of Henry Hitchcock, late of Mobile, deceased, brings this her bill against James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, who are all citizens of the State of Pennsylvania, residing in the city of Philadelphia, and who are found in the said southern district of Alabama.

And thereupon your oratrix complains and says, that in the year eighteen hundred and twenty, she then being a feme sole, and resident of Nashville, in the State of Tennessee, was lawfully married with Henry Hitchock, then a resident and citizen of the State of Alabama, and that immediately after said marriage she came to reside with her said husband in the State of Alabama, and the said Henry Hitchcock finally settled and resided in the city of Mobile, in the said district, and your oratrix lived with him in said city until the eleventh day of August, in the year eighteen hundred and thirty-nine, when the said Henry Hitchcock died at his said residence. And your oratrix shows further, that the said Henry Hitchcock was a citizen of the United States at the time of his death, and that your oratrix was also, and still is, such citizen.

Further complaining your oratrix shows, that during the continuance of her said coverture the said Henry Hitchcock, her said husband, became and was seized in his own right, and in fee simple, of a certain parcel of land in the city of Mobile, on the south side of Government street, and between Royal and Water streets; said lot having a front on Government street of two hundred and eight feet, by a depth of one hundred feet, and commencing at a point on the said south side of Government street, fifty-two feet from the southeast corner of Government and Royal streets, and extending towards the river, upon which said lot the said Henry Hitchcock caused to be erected eight four-story brick

dwellings, with stores underneath, each having a front of twenty-six feet on Government street, with a depth southerly of one hundred feet each, as aforesaid; that the said Henry Hitchcock was in possession of said property, and in receipt of the rents and profits thereof, up to the time of his decease as aforesaid, together with all the tenements, hereditaments, and appurtenances to the same belonging, in his own right. And your oratrix shows, that by virtue of her said intermarriage with the said Henry Hitchcock, and of his title and seizure to and of the said lot of ground with the appurtenances, she became and was, during her said coverture, entitled to an inchoate right or title in dower in said premises, and in every part thereof; and which, upon the decease of said Henry Hitchcock, became complete and absolute; and by the laws of the State of Alabama she thereby became entitled, and now is entitled, to one-third of the said property during her natural life; and to one-third of all the rents and profits accrued from, and arising out of, said property since the decease of her said husband.

Further complaining your oratrix shews, that the said Henry Hitchcock did not die intestate; that he left a last will and codicils, which were duly proved in the honorable the orphans' court of Mobile county shortly after his death, by which will he did make provision for your oratrix, and appointed her his executrix; but your oratrix did not qualify as such executrix, nor did she accept the provision made for her benefit, but renounced the said executorship, and Isaac H. Erwin was by the county court of Mobile county appointed administrator with the will annexed of the said Henry Hitchcock; and the estate being very largely indebted, the same was declared and reported insolvent by said administrator, and the said report of insolvency admitted to record in said court; and your oratrix did file within one year after the probate of the said will, in the county court of Mobile county, her dissent from the said will, and her election to have dower in the estate of her said husband, in lieu of the provision made for her by said will, in due form; which dissent was duly recorded in said court, by means of which renunciation her right to dower stands in full force.

And your oratrix further shows, that after the decease of the said Henry Hitchcock, to wit, on or about the eighth day of February, in the year eighteen hundred and forty, Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, claimed that a debt was due to them as trustees for the president, directors, and company of the Bank of the United States of Pennsylvania, and they claimed the right to possess and hold the said real estate in this bill mentioned for the payment of said debt, and they claimed to have the same by the authority of conveyances made by said Henry Hitchcock during the coverture of your oratrix, and under said claim of title under said Henry Hitchcock, they, the said Cowperthwaite, Dunlap, and Cope, as such trustees for the Bank of the United States of Pennsylvania as aforesaid, as well as under a deed of quit claim made to them by James Erwin, who claimed the same property, and was in possession thereof, claiming under a deed from the sheriff of Mobile county, on a sale made of the same after the de-

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cease of said Henry Hitchcock as the property of said Henry Hitchcock, did enter upon the said real estate, and did hold the same as trustees as aforesaid, and did possess and receive the rents, issues, and profits of said property, from the said eighth day of February, in the year eighteen hundred and forty, for the benefit of the said president, directors, and company of the Bank of the United States of Pennsylvania, until the day of , in the year eighteen hundred and forty- , when the said Cowperthwaite, Dunlap, and Cope conveyed all their right, title, and interest in said property to James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, who thereby acquired the title, and also received the possession, of the said property, and held as trustees for the said bank in the same manner as the said former trustees did, and received all the rents and profits from the said former trustees; and the said last mentioned trustees, succeeding the former ones, have from thence held the possession of said premises, and received the rents and profits thereof up to this time, and still hold the same, subject to the trustees aforesaid, and as trustees for the president, directors, and company of the Bank of the United States of Pennsylvania.

Further complaining your oratrix shows, that the said property herein before described is of great value; that during the lifetime of the said Henry Hitchcock it was valued at the sum of two hundred thousand dollars; that the said stores and houses formerly were rented at from fifteen hundred to two thousand dollars each, that the value has been since reduced, but that the said defendants have received a very large amount of rents and profits accruing from said property since the eighth day of February, eighteen hundred and forty, and still hold the same, the amount of which is unknown to your oratrix, but of which she prays an account may be taken in this court.

And your oratrix shews, that she has not in any manner, as she is advised, abandoned, released, or parted with her right of dower in said property, and she insists that she is entitled to the possession and profits of one-third thereof during her natural life, and to an account for, and payment of, one-third of, the rents and profits thereof, since the eighth day of February, 1840, out of the funds in the hands of the said trustees, James Dundas and others; but your oratrix shews that they, the said Dundas and others, deny the right of dower of your oratrix, and claim to hold said estate free and discharged from all claim of dower in your oratrix, and refuse to your oratrix the possession of any part, and refuse to account to her for her just portion of the rents accrued as aforesaid.

And your oratrix further shews, that the said Henry Hitchcock left five children, him surviving, at the time of his death, all being infants; that one of them hath since died, and that there are now four children of said Henry living, who are also children of your oratrix, namely, Caroline Hitchcock, Henry Hitchcock, Andrew E. Hitchcock, and Ethan A. Hitchcock, all under the age of twenty-one years; that your oratrix is the guardian of said children; that said children all reside at

Nashville, in the State of Tennessee, so that they cannot be made parties to this bill; but your oratrix charges that they have received nothing by descent or devise from the estate of their father, and are in nowise interested in this cause, being out of possession, and no decree is prayed affecting their rights; wherefore your oratrix is advised they are not indispensable parties, and that a decree may be rendered in this cause without prejudice to them, or their rights as heirs at law.

And your oratrix further shews, that the said Isaac H. Erwin, who was she administrator with the will annexed of said Henry Hitchcock, has died since the grant of administration to him, and that Charles A. Marston has been appointed by the county court of Mobile county administrator, de bonis non, of said estate of Henry Hitchcock, and is now the administrator; but inasmuch as the said Marston is a citizen of the State of Alabama, and that the said estate is held adversely to the heirs and administrator, and hns been so held ever since the 8th of February, 1840, aforesaid, and is not claimed by said administrator, your oratrix is also advised he is not an indispensable party to this bill, and that a decree may be rendered without prejudice to the said administrator in this bealf.

And your oratrix shews that no dower whatever has been assigned to her at any time in the estate of her said husband, and that she is justly entitled to have the same allowed to her out of the esstate above particularly described; wherefore she prays that the said James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, may be made defendants to this her bill of complaint; and that subpœnas may issue requiring them to appear in this honorable court within the time prescribed by law; and that they and each of them be required to answer on oath the matter in this bill charged and alleged against them; and that they be required to abide and perform all which may be decreed against them in this behalf.

And your oratrix prays that her right and title of dower in the premises above described be established, decreed, and allowed, and that the same be set off and allotted to her by metes and bounds, or otherwise, as the court may direct, and that she be let into possession thereof by the decree of this honorable court, and of the rents and profits thereof, and that her right and title to dower be decreed paramount to that of the said defendants; and further, your oratrix prays that an account be taken of the value, rents, and profits of said estate since the 8th day of February, 1840; and that the said defendants be decreed to pay to your oratrix the one-third of all the value, and rents, and profits of said estate since that time as properly belonging to her; and your oratrix prays that such orders be made from time to time, and such process be allowed her, and that such relief may be decreed her by this honorable court as may be according to equity and justice, and the rules of this court, and as her case may deserve and require; and, as in duty bound, she will ever pray, &c.

STEWART & EASTON,
And A. F. HOPKINS,
Solicitors for Ann Hitchcock, complainant.

I hereby accept due service of the within bill for the defendants therein named.

S. GRIFFITHS FISHER.

29th April, 1847.

Filed 29th April, 1847.

JOHN FITTS, *Clerk.*

UNITED STATES OF AMERICA.

Circuit court of the United States, for the fifth judicial circuit and southern district of Alabama.

The President of the United States, to the marshal of said district, greeting:

You are hereby commanded to summon James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, who are citizens of the State of Alabama, to be and appear before the honorable the circuit court aforesaid, at the place of holding said court at Mobile, at rules, to be held in the office of the clerk aforesaid on the first Monday of June next, to answer the bill of complaint of Anne Hitchcock for dower, &c., filed in said court on this twenty-ninth day of April, A. D. 1847. Herein fail not, and have you then and there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said circuit court, this first Monday of April, in the year of our Lord one thousand eight hundred and forty-seven.

Issued the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and forty-seven.

JOHN FITTS,
Clerk, C. C., southern district of Alabama.

The defendants are required to enter their appearance on or before the first Monday of June next, otherwise the bill will be taken as confessed.

JOHN FITTS, *Clerk.*

I hereby accept service of the within subpœna for the defendants therein named, 29th April, 1847.

S. GRIFFITH FISHER,
For defendants.

Answer.

The answer of James Dundas, Mordecai Lewis, Samuel W. Jones, Robert L. Pittfield, and Robert Howell, to the bill of complaint filed in the circuit court of the United States, against them, on the behalf of Anne Hitchcock.

The defendants, *serving* and reserving to themselves all and all manner of benefit of exception to the errors and uncertainties in the

plaintiff's bill contained, for answer thereto severally say, that they believe it to be true that Henry Hitchcock at the time of his death was seized of a fee simple estate in the property described in the plaintiff's bill, except as hereafter specified, and was in possession; and that the said Henry died in the month of August, A. D. 1839, in the city of Mobile, leaving the said Anne, his widow, surviving him. These defendants further say, that they oppose to the plaintiff's claim for dower the following facts: For they say that, in the lifetime of the said Hitchcock, he, being indebted to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, in the sum of six hundred and twenty thousand five hundred and thirty $\frac{00}{100}$ dollars, executed a mortgage to the said parties, by which he, on the 14th day of July, 1838, conveyed in fee simple to them, and the survivors and survivor of them, the parcels of land described in the said bill, upon the trust and condition that, if the said Hitchcock should well and truly pay the said debt, according to the terms and stipulations of his bond to the said parties, the conveyance was to be wholly null and void; the defendants, for further certainty, attach to this answer, as exhibit A, a certified copy of the said mortgage, taken from the records of the county of Mobile, and pray that the same may be held and taken as a part of this answer. The defendants aver that, as appears from the said paper, and as they will be able to show by a production of the original mortgage and the certificates thereon, the said plaintiff joined in the said mortgage, and executed a relinquishment of her dower in the lands described in the bill and mortgage; that the same was acknowledged, conformably to the statute, before Charles A. Marston, a notary public, acting for the county of Mobile, and that he has duly certified the facts on the mortgage and relinquishment; all of which will more exactly appear by the copy attached to this answer, and forming a part of the same, and which the defendants are prepared to substantiate, at the hearing, by producing the original deeds, executed by the parties as aforesaid, and the certificates of the proper officer upon the same.

For further answer the defendants say, that no portion of the money specified in the mortgage, and the security recited in the same, was paid by the said Henry Hitchcock during his life, but at the time of his death he was in default for the instalments then due. These defendants say that the said Henry died in August, 1839, leaving a last will and testament, which has been admitted to probate in the orphan's court of the county of Mobile, a certified copy of which is hereto attached, marked exhibit B, and is prayed to be taken as a part of this answer. These defendants say, that the said Anne Hitchcock entered upon the lands of her said husband after his death, and granted leases, accepted rents, and exercised acts of ownership and control over the property specified in the said mortgage.

That while she was so in the possession of the estate of the said Henry Hitchcock, upon the consideration recited in the deed on the 8th day of February, she executed to the said Cowperthwaite, Dunlap, and Cope, a full and absolute release of all her title, estate, right, in-

terest, or trust, property, claim, and demand, at law and in equity, in possession and expectancy, in and to all of the lands specified in the said bill, to have and to hold the same to them, and the survivors of them, and the survivor of them, and his heirs forever, to their sole and proper use and behoof; so that neither the said party, (Anne Hitchcock,) her heirs or assigns, nor any person in trust for them, or her, or in her or their name, can, or may, by any ways or means whatsoever, thereafter have or claim, challenge or demand, any right, title, interest, or estate, in the premises aforesaid, but therefrom and thereout, and *and* by the said promises, should be forever debarred and excluded; all of which will more fully appear by the said deed, a copy of which is hereto attached as exhibit C, which, with the certificates thereon, the defendants pray may be held and taken as a part of this answer, and that the same may be considered as the evidence of the contract aforesaid, these defendants being ready to produce the original on the hearing.

And these defendants aver that, at the time of executing the said deed, the said Anne surrendered the possession of the said property, and assigned the leases that had been executed by her with the covenants for rent and possession, and furnished to the said Cowperthwaite, Dunlop, and Cope all the evidences of title and the powers of control over said property in her possession.

Further answering these defendants say, that the said Cowperthwaite, Dunlop, and Cope, in consideration of the premises, released all their claims upon the estate of the said Henry Hitchcock, and agreed to look to the mortgage property alone for the satisfaction of the debt; and the said mortgage and the conveyance of the said Anne were held and taken to vest an absolute and unconditional estate in the said Cowperthwaite, Dunlop, and Cope; and that the legal effect of the said conveyance is and was designed to be a bar to any claim of dower in the said Anne.

These defendants further answering say, that they have heard, and so believe and aver, that the said Cowperthwaite, Dunlap, and Cope did, in addition to the agreement aforesaid, advance to the said Anne, or her agent, one hundred and fifty thousand dollars, to be applied to the payment of certain of the debts of the said Henry Hitchcock, as a part of the consideration of the said deed, and to quiet their title to the said property; and these defendants aver, that the object, design, and purpose of the said conveyance was to perfect the title of the said Cowperthwaite, Dunlop, and Cope, to the said lands and tenements, so that no claim of the plaintiff or of any other person should be set up against the same.

For further answer these defendants say, that after the execution of the said deed, and the transfer of her right of possession, and of the contracts of rent, the said Anne refused, as they are informed, to qualify as executrix of the said will of her husband, and repudiated the provisions made for her in it, and claimed her dower in lieu of those provisions; and that these renunciations were filed in the orphan's court

of Mobile county. They are also informed that one Isaac H. Erwin was appointed administrator with the will annexed, and commenced to intermeddle with the property aforesaid, disturbing the possession of the said Cowperthwaite, Dunlop, and Cope; and that, after the death of Isaac H. Erwin in 1843, Charles Marston was appointed the administrator de bonis non of the estate of Henry Hitchcock.

These defendants say that the said Cowperthwaite, Dunlop, and Cope, in 1840, with the president, directors, and company of the Bank of the U. S., of Pennsylvania, filed an original bill in the court of chancery, at Mobile, against the said Anne, and Isaac, and the children of Henry Hitchcock, deceased, setting forth the debt and mortgage aforesaid, the transactions of the settlement with the said Anne Hitchcock, and the disturbance of their title and possession, and the interest of the parties plaintiffs in the same; and claimed to have all the equities of the parties defendants foreclosed, and the title of the said parties plainitffs in said mortgage quieted, and their enjoyment secured.

These defendants say, that after the commencement of this suit in the court of chancery at Mobile, the whole estate of Cowperthwaite, Dunlop, and Cope, and of the said Bank of the United States, in the property and in the mortgage and debt, was granted and assigned to these defendants upon certain trusts, not material to be set forth in this answer; and that they were, together with the president, directors, and company of the Bank of the U. S., the cestui que use made complaints in the said bill.

These defendants further say, that the said Anne Hitchcock and the other parties appeared to the said bill, and at the term of the court of chancery, at Mobile, the cause came on to be heard for a final decree, and thereupon it was declared, that the said Anne did hold and take an absolute interest in the said lands by virtue of the will aforesaid, and that the said interest, by her deed, was vested in the said Cowperthwait, Dunlop, and Cope; and the said parties were, under the terms of said decree, foreclosed of all their interests in the said property, unless the debt and costs were paid pursuant to the decree.

Further answering the defendants say, that this decree was removed to the supreme court of the State of Alabama, and was in all parts affirmed at the January term of the supreme court, A. D. 1845; and at the next term of the said court, at Mobile, the parties failing to make payments under the decree, certified copies of such part of said records as explain and elucidate this portion of this answer are hereto attached, as exhibit E, to these answers, and prayed to be taken as a part thereof; the final order for a foreclosure was entered; all of which will more fully appear by the record and proceedings of the said courts, which remain unaltered, and the decrees aforesaid remain in full force and effect; and these defendants aver, that the effect of the said deed of said Anne was fully at issue in the said cause, and that the courts of chancery and the supreme court passed upon the same; and that the effect of the decrees aforesaid is, that the said Anne is debarred from all right and claim in the said property.

For these defendants aver, that the said Anne ought not to be permitted to set up any renunciation of her estates in the will of her deceased husband, after she has conveyed those estates for a valuable consideration to the said Cowperthwaite, Dunlop, and Cope, and they claim by virtue of the grant and assignment to them, of the said Cowperthwaite, Dunlop, and Cope, and of the decrees aforesaid, a full and absolute estate in the said property, discharged from the claim of the said Anne.

These defendants for further answer say, that the tracts of land mentioned in schedule D, hereto attached, and which are described in the bill of the plaintiff, and in the mortgage of the said Henry Hithcock, and in the deed of the said Anne, before referred to, are not in the possession of the defendants under these proceedings.

The first parcel has been recovered by the lessee of the legal representatives of Joshua Kennedy, dec'd, by a judgment of the circuit court of Mobile county, in a suit in ejectment, determined since the death of said Henry, at the term of said court, A. D. and a writ of possession was issued upon the same, and the tenant ejected. This judgment is now in full force and effect, and under it the possession of these defendants was destroyed.

These defendants for further answer say, that the action was commenced against Cornelius Robinson, the tenant in possession under the title of the said Henry Hitchcock, and that the recovery of the lessee (John Doe) of Kennedy's representatives in the suit aforesaid, was under a title adverse to that of the said Henry Hitchcock, and of those claiming under him, and that the property is now held adversely to that title under the judgment in the said cause, and is not in the possession or under the control of these defendants.

These defendants for further answer say, that as to the second parcel mentioned in the schedule D, the same was in possession of Wm. Magee, a receiver appointed during the pendency of the proceedings in chancery before described, in the year 1843, and that a suit in ejectment was commenced by the lessee of Joshua Kennedy's heirs and representatives, in the circuit court of Mobile county, against the tenants of the said receiver. These defendants say, that upon the trial of the said ejectment, at the spring term of said court, 1843, a recovery was had in favor of the plaintiff, and a writ of habere facias possession awarded to him to recover his possession.

They say, that at the same time an issue was tried under the statute for the relief of tenants in possession from dormant titles, passed in 1836, when the improvements were assessed at the sum of $10,000, and the lands at the sum of $3,000; a judgment was entered in *in* favor of the plaintiff with a stay of execution until the improvements were paid for, and which improvements were made after the mortgage to said Cowperthwaite, Dunlop, and Cope, and in case of neglect to pay for the same within twelve months, then the defendants were to have a further stay of three months within which to pay for said lands. These defen-

dants say that they paid the said sum of $3,000 so assessed under the authority of the said judgment, and now hold the said lands.

They further represent, that since the payment aforesaid they have made another payment of four hundred dollars to Julius Choudron, who purchased the same under the decree of the court of chancery at Mobile, in a suit in favor of the heirs and administrator of Daniel Duvall against one Getz. That the said Henry Hitchcock purchased the title of the said Getz pending the said suit, and entered into the lands under it, and that the suit was commenced against the said Getz, to foreclose a mortgage made to the said Duvall, and the money due on which had never been paid. That a decree establishing the debt and mortgage was made at the November term of the court of chancery, A. D. 1841, and the property aforesaid ordered to be sold in case of a default.

These defendants say, that the money was not paid and a sale of the property took place, and Julius Chaudron became the purchaser, and the proceedings of the sale were confirmed by the court, and the said Chaudron became entitled to the property. These defendants state, that the title and estate of said Hitchcock was bound by this decree, from the fact that he purchased the title of Getz pending the suit, and after Getz had been duly made a party to the same, and that he held under it. And for the reason that the defendants could not successfully defend their title and possession they purchased the right of the said Chaudron, all of which the defendants are ready to aver and maintain by the record and proceedings remaining in the court of chancery aforesaid, and by the deeds and other evidences in the cause, and they plead the same in bar of the plaintiff's claim to dower in said lands. And for further answer the defendants say, that as to the lands mentioned thirdly in schedule D aforesaid they say, that the title of the said Henry Hitchcock accrued in the year 1838, by a purchase from Audley H. Gazzam, under whose title he entered in possession. These defendants say, that at the date of said purchase by the said Hitchcock of the said Gazzam, the said Gazzam had encumbered the said lands with the payment of a large sum of money due to Wm. R. Hallett, and had given to him a mortgage to secure the same.

These defendants say, that the said Hallett, since their possession and title have accrued, commenced a suit in the court of chancery at Mobile to foreclose the mortgage, and made these defendants and the said Gazzam parties defendants. By a decree of that court, at the spring term, 1845, the mortgage and debt were established, and the sale of the property ordered; and that all the property liable to the satisfaction of the said mortgage was sold prior to the property described in schedule D as aforesaid; and to prevent the sale of the same these defendants paid the remainder of the debt to Wm. R. Hallett, due on the mortgage aforesaid, amounting to the sum of $5,183 $\frac{13}{100}$, on the 13th day of June, 1845, the day of the payment, and took an assignment of the mortgage and decree to Samuel L. Folwell, in trust for your orators, and the same remains in full force and virtue; whereby, in consequence of the outstanding mortgage, and the relief of the said pro-

perty from the same by these defendants, these defendants say that they are entitled to set up the same against the plaintiff's claim for dower, and for any claim to account under the same.

And these defendants say, that for so much of the claim of the said plaintiff for an account that accrued more than six years before the filing of this bill, they plead the statute of limitations, and say that the causes of action, if any there were, accrued more than six years before the bill was filed, and that the plaintiff was under no disability, and could have maintained her suit for the same; and because she did not make any legal claim for the same; these defendants say that they are under no necessity to answer further.

And these defendants for further answer say, that the facts before stated sufficiently show that the defendants are under no necessity to make any account to the said Anne, and they plead that by virtue of the deed of mortgage aforesaid, and of her relinquishment of dower on the same, and the certificate of the officer of her acknowledgment thereto, and the default in the payment of the debt, she cannot make any claim for dower or an account in the said lands, and the defendants plead the said deed of relinquishment, and the recitals therein, and the due and legal acknowledgment thereof, in bar of the relief and discovery sought for in said bill.

And, further, these defendants plead the deed of the said Anne Hitchcock to the said Cowperthwaite, Dunlop, and Cope, and the matters therein contained, in bar to the relief and discovery sought for in the said bill, and insist, by the said deed, she is debarred and estopped from asserting any claim for dower in the said lands, or that she did not accept the provisions of the said will, and they aver that she could not set up any renunciation of her interests under the will to defeat the said deed.

And these defendants further say, that the proceedings in the court of chancery at Mobile, in the suit between the said Cowperthwaite, Dunlop, and Cope, and these defendants, and the president, directors, and company of the Bank of the United States, as complainants, and the said Anne Hitchcock and others, as defendants, before referred to on a bar to the claim of the said Anne. That by the said decree the said Anne was declared to have a full estate in fee simple under the will, and that all other estates were merged in the same, and that under the powers and trusts in the said will she was competent to convey said lands, and that the said conveyance was effectual to the said purpose. And these defendants plead in bar of the plaintiff's prayer for discovery and relief the said decrees, which they aver remain in full force and effect.

And now, having fully answered and pleaded, they pray to be hence dismissed with their cost. J. A. CAMPBELL,

For defendants.

Exhibit A.

Know all men by these presents, that I, Henry Hitchcock, of the city and county of Mobile, in the State of Alabama, in consideration of the

sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, to me in hand paid by Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, in the State of Pennsylvania, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, convey, and confirm, unto the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, and to *to* the survivors and survivor of them, and the heirs, executors, administrators, or assigns of such survivor forever, all those pieces and parcels of ground lying and being in the city of Mobile, and which are described as follows, to wit: Three lots, with three four-story brick stores with granite fronts thereon, beginning at a point on the south side of St. Francis street, ninety feet west of Commerce street; thence running west on said street sixty-three feet to the premises of Robertson, Beal & Co., having a depth of seventy-six feet, valued at seventy-five thousand dollars. Also a house and lot on the north side of St. Louis street, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street; thence running west on St. Louis street sixty-eight feet, having a depth of one hundred and ten feet, valued at fifteen thousand dollars. Also a lot and house at the northwest corner of Church and St. Joachim streets, having a front on Church street of one hundred and thirteen feet by a depth of eighty feet on St. Joachim street, valued at twelve thousand dollars. Also a house and lot situate on the south side of Government street, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house, valued at twenty-five thousand dollars. Also a vacant lot on the south side of Government street, having sixty-six [feet] front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet, valued at twelve thousand dollars. Also a vacant lot in the rear of the last mentioned lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet, valued at five thousand dollars. Also four vacant lots on the north side of Government street between Franklin and Hamilton streets, having a front of fifty feet on Government street equal to two hundred and twenty feet, by a depth of one hundred and two feet, valued at thirty-three thousand dollars. Also a vacant lot in the rear of the above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet, valued at six thousand dollars. Also three lots, including a three-story brick dwelling and out-houses, on the north side of Government street, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet, valued at fifty-five thousand dollars. Also fifty-four acres of ground on the west side of Mo-

bile bay, called and known as Frescati, bounded on the east by said bay, on the south by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon, valued at fifty thousand dollars. Also two three-story brick dwellings, with stores underneath, on the north side of Government street, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel, valued at forty thousand dollars. Also eight four-story brick dwellings, with stores underneath, on the south side of Government street, commencing fifty-two feet from the south-east corner of Government street, having a front of twenty-six feet each, extending east towards Water street two hundred and eight feet, by a depth of one hundred feet, valued at two hundred thousand dollars. Also nine lots, twenty-four feet *feet* front each, whereon stands the Mobile steam cotton-press, with brick cotton sheds, having a front on the east side of Water street two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine, valued at one hundred and eleven thousand dollars. Also ten lots, of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick, valued at seventy-three thousand two hundred dollars. Also ten vacant lots, each twenty-eight feet front, on the north side of St. Francis street, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet, valued at fifty thousand dollars. Also a lot fronting thirty-four feet on Joachim street, by a depth of one hundred and sixty feet, in the rear of the above, valued at six thousand dollars.

Also a lot fronting thirty feet on St. Joachim street, in the rear of No. 16, and one hundred and twenty feet deep, valued at five thousand dollars. Also one entire square, bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal, by four hundred and fifty feet on Maine and Massachusetts streets, valued at one hundred and sixty-three thousand dollars. Also a water lot in front of the above, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon three hundred and twenty feet by ninety feet, valued as part of the above premises. Also a house and lot at the northwest corner of St. Emanuel and Eslava streets, fronting sixty feet on St. Emanuel street, by a depth of one hundred and thirty feet, valued at twenty-five thousand dollars. Also a house and one lot at the northwest corner of St. Louis and Jackson streets, eighty-five feet front on St. Louis street, by a depth of one hundred and twenty feet, valued at twenty-five thousand dollars; together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances unto the above mentioned and described premises belonging or in any wise appertaining; to have and to

hold the above mentioned and described premises, with the appurtenances, unto the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and to the heirs, executors, and assigns of such survivor, forever. Provided, always, and these presents are upon this express condition, that if the said Henry Hitchcock shall well and truly pay to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with eight per cent. interest per annum from the first day of March, A. D. one thousand eight hundred and thirty-eight, thereon accruing, payable semi-annually, according to the condition of a certain bond by the said Henry Hitchcock given, payable to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, bearing even date with these presents, then these presents shall cease, determine, and be void; otherwise to be and remain in full force and virtue. Given under my hand and seal, this fourteenth day of July, in the year of our Lord one thousand eight hundred and thirty-eight.

H. HITCHCOCK,
ANN HITCHCOCK.

Signed, sealed, and delivered in presence of—

And I, Ann Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar, to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish by these presents, all my right and title of dower in and to the above described premises, to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, and to the heirs, executors, and assigns of such survivor, forever.

Witness my hand and seal, this fourteenth day of July, one thousand eight hundred and thirty-eight.

ANN HITCHCOCK. [SEAL.]

Attest: CHARLES A. MARSTEN.

THE STATE OF ALABAMA,
Mobile county.

Personally appeared before me, Charles A. Marsten, notary public in and for said county, the above named H. Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned. And also appeared personally before me, Charles A. Marston, Ann Hitchcock, wife of the said H. Hitchcock, who being examined privately and apart from her said husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely, and of her own accord, and without any fear, threats, or compulsion of her said husband.

Given under my hand and seal notarial, this fourteenth day of July, A. D. 1838.

CHARLES A. MARSTON.

THE STATE OF ALABAMA,
Mobile county.

I, Drury Thompson, clerk of the county court of said county, certify, that the foregoing is a transcript of the record of a deed of mortgage from Henry Hitchcock to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, as recorded in my office, in book V, pages 569, 570, 571, and 572.

Given under my hand and seal of office, this seventeenth day of November, A. D. 1847.

D. THOMPSON, *Clerk.*

Exhibit B.

In the name of God. I, Henry Hitchcock, of the city of Mobile and State of Alabama, being of sound and disposing mind, and in the blissful hope of salvation through the pardoning means of a crucified Saviour, do make and declare this my last will and testament, hereby revoking all former wills and codicils:

1st. After the payment of my just debts, I desire that my aged and respected mother shall, in addition to the lease of the house and lot and the servants she has during her life, *shall* receive annually the sum of one thousand dollars for her comfort and support.

2d. I give and bequeath to my brother, Capt. Ethan A. Hitchcock, the sum of ten thousand dollars.

3d. I give and bequeath to my brother, Samuel Hitchcock, the sum of ten thousand dollars, and I hereby discharge him from all demands of every kind which my estate may have against him for moneys heretofore advanced.

4th. I give and bequeath unto my nephew, William Perkin, the sum of five thousand dollars.

5th. I desire that Augusta and Lucretia Hitchcock, now at school at New Haven, under the care of Mrs. Peters, shall be educated at the expense of my estate, and that they shall each receive from my estate, on arriving at the age of eighteen years, the sum of five thousand dollars.

6th. All the above legacies shall be paid (except the last) as soon after my debts are paid as the situation of my estate will admit.

7th. For the purpose of having my estate properly settled and administered during the minority of my children, I do hereby appoint my dear wife, Ann, my sole executrix; and I do bequeath and desire the same, both real and personal, to her, in trust with full power to sell either at public or private sale all or any part thereof, and their proceeds to re-invest and will at her discretion, either for the purpose of paying my debts and legacies, or for a more advantageous investment, and good and sufficient deeds and conveyances to make therefor. It being my intention and will that my estate shall be kept together and held in common by my wife for her benefit and that of my children, until they shall arrive at age respectively, at which time, and as often as one of them comes of age, he or she is to receive their propor-

tion; it being always understood, that my wife is to receive an equal proportion of all my estate with my children, she and they having share and share alike.

8th. Almighty God in his great kindness having intrusted much of this world's goods to my care, I do hereby desire my executrix to appropriate annually for ten years, out of the income of my estate, the sum of five thousand dollars, to be a charge upon the same, to such religious and charitable institutions and purposes as she may think most suitable and proper. And I do hereby remit five thousand dollars of the debt due by my friend, the Rev. Wm. T. Hamilton, for advances made by me for him, and desire my executrix not to push him for the balance.

In testimony whereof I have hereto set my hand and seal, this 13th May, 1836.

HENRY HITCHCOCK. [SEAL.]

WM. PHINEAS BROWN,
BENJ'N STANTON, JR.,
D. STODDER.

Codicil.

Whereas I, Henry Hitchcock, of the city of Mobile, having made and duly executed my last will and testament in writing, bearing date the thirteenth day of May, 1836, now I do hereby , that I do this day reaffirm and publish the same, so that it shall include all my estate, real and personal, to this date, except so far as the same is modified by this codicil.

1st. My estate having considerably increased since the date of my will, I hereby authorize my executrix to extend, in her discretion, the donations mentioned in the eighth clause of said will so as to make the same ten thousand dollars a year for ten years.

2nd. It is my will and desire that the nett profits of the seventy-five shares of stock standing to my name in the Gordon purchase, after the purchase money and interest has been paid, its use shall be invested in stocks, and the interest thereon appropriated forever to the establishment of common schools in the city of Mobile, for the education of poor children, that being my original intention in subscribing for said stock.

In witness whereof I, the said Henry Hitchcock, have to this codicil set my hand and seal, this first day of September, 1836.

HENRY HITCHCOCK. [SEAL.]

In presence of—
WM. EDMUND,
MOSES WARING,
THOMAS S. JAMES.

MOBILE, *August* 4, 1837.

I do hereby make the following as a second codicil to the above will and codicil:

2d codicil.

1st. The great revulsion in commercial affairs having greatly embar-

rassed my estate, and not knowing how it may eventually be settled, I hereby reserve out of my estate, after my just debts are paid, and before any legacies are paid, the sum of twenty thousand dollars for my wife, and the like sum of twenty thousand dollars for each of my children that may be alive at my decease, giving to each the sum of twenty thousand, should my estate after the payment of my debts be of sufficient value to give them the same; if not, the same must be divided equally between my wife and children.

2d. Whatever sum may be left after the above item is complied with, shall be applied pro rata to the payment of the legacies above specified, pro rata until they are paid.

3d. My mother having purchased the old family mansion at Burlington, Vermont, where she has settled, the house and servant in this city need not be reserved for her; but the sum of one thousand dollars per annum is to be paid her during her life.

4th. I hereby reaffirm and republish this will in all other respects.

Given under my hand and seal this 4th August, 1837.

H. HITCHCOCK. [SEAL.]

In presence of—
H. READ,
WM. PHINEAS BROWN,
WM. EDMUND.

3d codicil.

Having purchased several pieces of real estate since the date of the last codicil to my will, which bears date the 4th day of August, 1837, I hereby republish the same, to take effect from this date, desiring my executrix to carry the same into effect according to the directions of said will as modified by said codicil.

Witness my hand and seal the day and year above written.

H. HITCHCOCK. [SEAL.]

Teste:
WM. EDMOND,
HENRY STICKNEY,
WM. P'AS BROWN.

4th codicil.

Being in a low state of health, I have this day reviewed the several testamentary papers heretofore executed by me, and also those which have been cancelled; I have no new testamentary disposition to make, but desire that my will, as it results from four papers heretofore executed by me, shall be carried into effect, giving to such one the proper control which it should have in point of time. The said four papers are herewith enclosed, and dated as follows:

1st one dated May 13th, 1836; 2d one dated September 1st, 1836; 3d one dated August 4th, 1836; 4th one dated February 21st, 1838. They are all in my own handwriting. To the end, therefore, that my said executrix shall have full power to sell, convey, and dispose of real

estate, as well as all other property, I again declare my intention that such power to sell and convey shall extend to all lands acquired since the making of said testamentary papers, as well as to those acquired before, full power being intended to be given her in this respect; I do therefore affirm again the said testamentary dispositions, and desire them to be carried into full effect; the last, of course, controlling previous dispositions where inconsistent.

Given under my hand this tenth day of August, 1839.

H. HITCHCOCK.

Signed, published, and declared in our presence, as subscribing witnesses, and in the presence of each and all of us together, this tenth day of August, 1839.

JAMES SANFORD,
GEORGE N. STEWART,
ISAAC H. ERWIN,
WM. J. LEDYARD.

5th codicil.

Having this morning sealed up and closed my will in presence of witnesses, I wish now to provide for an omission, and do so accordingly.

Item.

I do hereby give, leave, and bequeath, to my worthy friend, William Edmund, in consideration of his faithful services, the sum of five thousand dollars, in addition to his salary of the present year, to be paid out of the proceeds of my mulberry crop of the present year.

Item.

I do also give, leave, and bequeath, to Bernard Martin, my gardener, the sum of one thousand dollars, in addition to his salary of the present year, to be paid in like manner out of my mulberry crop of the present year, in consideration of his faithful services.

Item.

I wish all my slaves to be furnished with a good plain suit of mourning clothes each.

Witness my hand this tenth day of August, 1839. Afternoon.

H. HITCHCOCK

Witness:

GEORGE N. STEWART,
ISAAC H. ERWIN,
WM. J. LEDYARD.

ORPHAN'S COURT, *Mobile county.*

Personally appeared, in open court, James Sanford, William J. Ledyard, and Isaac H. Erwin, three of the subscribing witnesses to the last will and testament of Henry Hitchcock, deceased, late of said county, who declared, on oath, that the papers now produced in court, the one dated May the 13th, 1836, and the other dated 1st September, 1836; one other dated February 21st, 1838; one other dated August 4th,

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1836; one other dated 10th of August, 1839; and do contain the last will and testament of the said Henry Hitchcock, as declared by him, and signed and published by him in our presence, who, at his request and in his presence, and in presence of each other, have subscribed the same, and in the presence of George N. Stewart, who also subscribed the same as witnesses thereto. Also appeared in open court, Isaac H. Erwin and William J. Ledyard, attesting witnesses to the codicil to the last will and testament of Henry Hitchcock, who on oath declared that the paper here produced, dated 10th August, 1839, was signed, sealed, and published, and delivered by the said Henry Hitchcock, a codicil to his last will and testament in our presence, and in presence of George N. Stewart, the other subscribing witness thereto, who in the presence of said Henry Hitchcock, and by his request, and in the presence of each other, did on the day of the date thereof subscribe the same as witnesses thereto.

WM. J. LEDYARD,
ISAAC H. ERWIN,
JAMES SANFORD.

Sworn to in open court.

WM. TAYLOR, *Clerk.*

Whereupon it is ordered that said last will and testament and codicils be admitted to probate.

17th August, 1839. JNO. F. EVERETT.

THE STATE OF ALABAMA,
Mobile county.

I, Drury Thompson, clerk of the county court of said county, certify, that the foregoing is a transcript of the record of the last will and testament of Henry Hitchcock, dec'd, as recorded in my office, in will book B, pages 37, 38, 39, 40, and 41 and 42.

Given under my hand and seal of office, this twenty-seventh day of Dec'r, A. D. 1847.

D. THOMPSON, *C'k.*

Exhibit C.

This indenture, made the eighth day of February, A. D. 1840, by and between Anne Hitchcock, widow and sole devisee of Henry Hitchcock, late of Mobile county, acting under and by virtue of the last will and testament, and the several codicils thereunto annexed, of the said Henry Hitchcock, duly proved and of record in the orphans' court of Mobile county, of the first part; and Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, and State of Pennsylvania, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of seven hundred and seventy-three thousand four hundred and fifty-two dollars and twenty-three hundredths dollars, to her well and truly in hand paid, at and before the ensealing and delivery of these presents, by the said parties of the second part, the receipt whereof she doth hereby acknowledge, hath remised, released, conveyed, and forever quit-claimed, and doth,

by these presents remise, release, convey, and forever quit-claim, unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, all the estate, right, title, interest, use, trust, property, claim, and demand, whatsoever, at law as well as in equity, in possession as well as in expectancy, of, in, to, or out of, all and singular the following described lands and premises; that is to say, all those three lots, with three four-story brick stores, with granite fronts thereon, beginning at a point on north the side of Saint Francis street, in the city of Mobile, ninety feet west of Commerce street; thence running west on said street sixty-three feet, to the premises of Robertson, Beale and Company, having a depth of seventy-six feet. Also a house and lot on the north side of Saint Louis street, in said city, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street; thence running west on Saint Louis street sixty-eight feet, having a depth of one hundred and ten feet. Also a house and lot on the northwest corner of Church and Saint Joachim streets, in said city, having a front on Church street of one hundred and thirteen feet, by a depth of eighty on St. Joachim street.

Also a house and lot situate on the north side of Government street in said city, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, known as the Acre house. Also a vacant lot on the north side of Government street in said city, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet. Also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet. Also four vacant lots on the south side of Government street in said city, between Hamilton and Franklin streets, having a front of fifty feet on Government street, equal to two hundred and thirty feet, by a depth of one hundred and two feet. Also a vacant lot in the rear of the above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet. Also three lots, including a three-story brick dwelling and out-houses, on the north side of Government street in said city, at the north east corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet. Also fifty-four acres of ground in Mobile county, situate on the west side of Mobile bay, called and known as Frescati, bounded on the east by said bay, on the north by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon.

Also two three-story brick dwellings, with stores underneath, on the north side of Government street in said city, between Royal and Water

streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel. Also eight four-story brick dwellings with stores underneath, on the south side of Government street in said city, commencing fifty-two feet from the southeast corner of Government and Royal streets, having a front of twenty-six feet each, extending east, towards Water street, two hundred and eight feet, by a depth of one hundred feet. Also nine lots, twenty-four feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street, two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine. Also ten lots of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, in said city, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick. Also ten vacant lots, each twenty-eight feet front on the north side of Saint Francis street in said city, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet. Also a lot fronting thirty-four feet on Joachim street in the said city, by a depth of one hundred and sixty feet in the rear of the above. Also a lot fronting thirty feet on Saint Joachim street in said city, in the rear of the above mentioned ten lots between Joachim and Jackson streets, and one hundred and twenty feet deep. Also an entire square bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets in the said city, and a water-lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon, three hundred and twenty feet by ninety feet. Also a house and lot at the northwest corner of Saint Emanuel and Eslava streets in said city, fronting sixty feet on Saint Emanuel street, by a depth of one hundred and thirty feet. Also a house and lot, at the northwest corner of Saint Louis and Jackson streets in said city, eighty-five feet front on Saint Louis street, by a depth of one hundred and twenty feet; together with all and singular the buildings, improvements, hereditaments, rights, members, privileges, and appurtenances to all and singular the above mentioned and described lands and premises belonging or in anywise appertaining. To have and to hold all and singular the aforesaid lands, tenements, improvements, and appurtenances, unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of survivor, to their own proper use, benefit, and behoof forever; so that neither the said party of the first part, her heirs or assigns, nor any person or persons whatsoever, in trust for them or her, or in her or their name or names, can or may, by any ways or means whatsoever, hereafter have claim, challenge, or demand any right, title, interest, or estate of, in, to, or out of all and singular the premises above described, and hereby released and conveyed; but

therefrom and thereout are and shall be by these presents forever excluded and debarred.

In testimony whereof the said parties hereto set their hands and seals, the day and year above written.

ANNE HITCHCOCK. [SEAL.]

Signed, sealed, and delivered in presence of us—
J. ERWIN,
T. G. BROWN,
Notary Public.

STATE OF ALABAMA,
Mobile county.

Be it remembered, that the within named Anne Hitchcock, on the eighth day of February, A. D. 1840, appeared personally before me, Thomas G. Brown, a notary public in and for the county aforesaid, and acknowledged that she signed, sealed, and delivered the within deed of quit claim on the day and year, and for the uses and purposes, therein mentioned.

Witness my hand and seal notarial the day [and] year above mentioned.

T. G. BROWN,
Notary Public.

THE STATE OF ALABAMA,
Mobile county.

I, Drury Thompson, clerk of the county court of said county, certify, that the foregoing is a transcript of the record of a deed from Anne Hitchcock to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, as recorded in my office in book Z, pages 488, 489, and 490.

Given under my hand and seal of office, this seventeenth day of November, A. D. 1847.

D. THOMPSON, *Clerk.*

Exhibit D.

This indenture, made the eighth day of September, in the year of our Lord one thousand eight hundred and forty-one, between Joseph Cowperthwaite and Rebecca, his wife, Thomas Dunlap and Ann W., his wife, Herman Cope and Mary, his wife, all of the city of Philadelphia and State of Pennsylvania, of the first part, and James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, of the same city and State, of the second part, witnesseth: That the said parties of the first part, for and in consideration of one dollar to them in hand paid by the said parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors, and administrators, forever released and discharged from the same by these presents, have granted, bargained, sold, re-

mised, released, enfeoffed, conveyed, and confirmed, and by these presents do grant, bargain, sell, remise, release, enfeoff, alien, convey, and confirm, unto the said parties of the second part, the survivor and survivors of them, and the heirs, executors, administrators, and assigns of such survivor forever, all those several pieces, parcels, and lots of land and premises situate, lying, and being in Mobile county, State of Alabama, described and designated as follows, to wit:

Three lots of land, being part of section number fourteen, in township number four, and range number two, west of the lands subject to sale at the United States land office at St. Stephen's, Alabama, and being lots numbered one, five, and eight, according to a plat or plan thereof made by James Dowell, surveyor, for Joshua and Christopher Collins, on the fourteenth day of June, 1839, and recorded in the office of the clerk of the county court of Mobile county, in book Z, page 209, as by reference to the same will more fully appear, each of the said lots containing ten acres. Also those certain tracts and parcels of land, being in township number four, south of the thirty-first degree of latitude, and range two west, known and described as follows, to wit, the northeast quarter and the southwest quarter of section number twenty-four, containing three hundred and eighteen $\frac{75}{100}$ acres; the east half of the southeast quarter of section number twenty-three, containing eighty $\frac{10}{100}$ acres; the southwest quarter of section number twenty-three, containing one hundred and sixty $\frac{30}{100}$ acres; the southeast quarter of section No. twenty-two, containing one hundred and sixty $\frac{20}{100}$ acres; the whole of the above described tracts being land subject to sale at the district of St. Stephen's, in the State of Alabama, and containing in all seven hundred and nineteen $\frac{25}{100}$ acres; also the west half of the southwest quarter of section number three, in township number five, of range two west, containing eighty acres. Also the following pieces, parcels, and lots of land lying and being in township two south, and range number one east, of lands subject to sale at St. Stephen's, in the State of Alabama, and described as follows, viz: the southeast quarter and the east half of the southwest quarter of section number five, containing two hundred and forty acres; the southwest quarter of section number four, containing one hundred and sixty acres; the east and west subdivision of the southeast fractional quarter of section number four, containing one hundred and forty-eight $\frac{45}{100}$ acres; and the southwest fractional subdivision quarter of section number three, containing thirty-six $\frac{30}{100}$ acres. Also those certain pieces or parcels of land, described as follows, viz: the southwest quarter and the west half of the southeast quarter of section number thirty-one, in township number two south, and range number one east, containing two hundred and forty acres; the east half of the southeast quarter of section thirty-six, and township number two south, and range number one west, containing seventy-nine $\frac{31}{100}$ acres. Also division C and D, and the northwest quarter of fractional section number twenty-one, containing one hundred and eighty acres; and west fractional section

number twenty-two, containing eighty-eight $\frac{44}{100}$ acres, all in township two south, and range one east, and being lands subject to sale at Saint Stephen's, in the State of Alabama; the said above described lands having been conveyed by A. H. Gazzam and wife to George Wragg, by indenture recorded in the office of the county clerk of Mobile county, in book W, pages 351, 352, 353, 354. Also the undivided one-half of the undivided one-fourth part of so much of all that piece, parcel, or tract of land, situate, lying, and being within the corporate limits of the city of Mobile, and known and distinguished therein by the name of the Regute Bernody tract of land, as was set apart and conveyed to George Poe, jr., by a certain indenture of partition made and executed on the twenty-fifth day of May, one thousand eight hundred and thirty-two, by and between William H. Robertson and Jane S., his wife, Philip McLoskey, and George Poe, jr., reference being had to the original indenture between the parties aforesaid, which is duly recorded in the office of the clerk of the county court of Mobile county, in book K, pages 301 and 302, as by reference to the same will more fully appear; the said piece and parcel of land and premises hereby conveyed being the undivided one-half of the undivided one-fourth part as aforesaid, containing about seventeen and a half acres, and being the undivided half of the interest which Audley H. Gazzam had in the said tract of land above described, after deducting from the quantity set apart to the said George Poe, junior, by the said deed of partition, about six acres heretofore conveyed by the said George Poe, junior, to Mrs. Sarah Barnes; and also about eight acres of land heretofore conveyed by deed of quit claim by said George Poe, junior, to William D. Gager, and being the same premises which Audley H. Gazzam and wife conveyed to George Wragg, by deed recorded in the office of the clerk of the county court of Mobile county, in book S, pages 128 and 129. And also the following described piece or parcel of land and premises, situate within the district of lands subject to sale at the United States land office at St. Stephen's in Alabama, that is to say, the northeast quarter of section fifteen, in township four, range two west, containing one hundred and fifty-nine $\frac{60}{100}$ acres, and being the same premises which Audley H. Gazzam and wife (inter alia) conveyed to George Wragg, by deed recorded in the office of the clerk of the county court of Mobile county, in book S, pages 175, 176. Also the following described pieces or parcels of land and premises thereunto attached, situate in the city of Mobile, that is to say, a certain lot of ground fronting on the south side of Church street in said city, forty-six feet, beginning at a point one hundred and twenty-one feet westward from the southwest corner of Church and Jackson streets, and running thence westwardly with line of Church street forty-six feet, to a point; thence southwardly with the said width of forty-six feet, for a distance of one hundred and fifty-two feet in depth; also two other lots fronting together on the west side of Jackson street in said city, eighty-six feet six inches, beginning at a point fifty-five feet distant from the

northwest corner of Munroe and Jackson streets, and running thence northwardly with the line of Jackson street eighty-six feet six inches; thence westwardly, with the same width of eighty-six feet six inches, for a distance in depth of sixty-one feet; also four other lots, fronting together on the west side of Munroe street in said city, eighty-four feet six inches, beginning at a point sixty-five feet four inches from the northwest corner of Munroe and Jackson streets, and running thence with the line of Munroe street eighty-four feet six inches, northwardly with the said width of eighty-four feet six inches, for a distance in depth of one hundred and thirty-eight feet; together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances, to the said above described premises belonging or in any wise appertaining; also that certain dwelling-house and lot of land situate on the north side of Munroe street, and beginning at a point fifty feet distant, eastwardly from the northeast corner of said Munroe and Claiborne streets in said city, and having a front on said Munroe street of about twenty-six feet, and a depth northwardly of about one hundred and thirty feet with the same width, to a fifteen foot wide alley in the rear of said lot, as at present laid out; also the said fifteen feet wide alley, in the rear of said lot as at present laid out, running from Jackson street to Claiborne street, about midway between Church and Munroe streets; and also that certain other lot and house thereon erected, situate at the northwest corner of Munroe and Jackson streets in said city, fronting on the north side of said Munroe street, about sixty-four feet, and extending in depth on the western side of Jackson street with the same width about sixty-two feet, bounded on the west by premises lately occupied by the Rev. S. S. Lewis, and on the north by premises lately occupied by George Wragg; also the following lot, piece, or parcel of land and premises, situate, lying, and being in the city of Mobile, that is to say, commencing at a point on the south line of the Favre tract, distant nine chains and nine links east, from the southwest corner of said tract, and running thence north 8° west, seven chains sixty-seven links; thence north 76° 30′ east, eight chains seventy-five links; thence south 8° east eleven chains ten links, to a post on the south line of said tract; thence north 82° west, along said line nine chains nine links, to the place of beginning; also the following described lot of land and premises thereunto attached, said lot situated on the south side of Saint Francis street, in said city, between Lawrence and Cedar streets, beginning at the corner of a brick basement west of, and distant from, the corner of Lawrence and Saint Francis streets one hundred and ten feet, running thence westwardly, with the south line of Saint Francis street, forty-one feet; thence southwardly, on a line parallel with Lawrence street, one hundred and ten feet; thence eastwardly, on a line parallel with Saint Francis street, forty-one feet; and thence northwardly, on a line parallel with Lawrence street, one hundred and ten feet, to the place of beginning.

Also the following described lot of land and premises thereunto attached; said lot, situate on the south side of Saint Michael street in said

city, between Cedar and Lawrence streets, having a front on Saint Michael street of forty-six feet, with a depth of ninety-one feet, bounded on the north by Saint Michael street, on the south by a line parallel with Saint Michael street, and distant therefrom ninety-one feet; on the west by a line parallel with Cedar street, and distant therefrom fifty-five feet; and on the east by a line parallel with said western line, and distant therefrom forty-six feet. Also all the undivided one-half of all that certain piece, parcel, or lot of land, with the three two-story brick stores erected thereon, situate in the city of Mobile aforesaid, bounded east by Commerce street, north by St. Michael street, south by Planter's street, and west by an alley, having a front on Commerce street of eighty-four feet; a front on Planter's street of sixty-five feet, including half the alley; and a front on Saint Michael street of sixty-five feet, including half the alley. And also all the undivided one-half of that certain piece, parcel, or lot of land, with the store erected thereon, immediately west of and adjoining the foregoing described property, having a front on Saint Michael street of thirty-six feet, including half the alley; and bounded east by the alley, and by the three stores before mentioned; north by Saint Michael street, south by Planter's street, and west by a store lately the property of J. Beylle; being the undivided half of the premises conveyed to Joseph E. Sheffield and to George Steen, and Laurens and St. John, by deed of the 1st of April, 1834; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. Also those three certain lots situate in the city of Mobile, in square number two hundred and sixty-five, (265,) fronting on Saint Joseph street, and having a front of forty feet each, by a depth of one hundred and ten feet, and being lots numbered one, two, and three of the square above mentioned. Also all and singular the following described land and premises, that is to say, all these three lots with three four-story brick stores, with granite fronts thereon, beginning at a point on the south side of Saint Francis street, in the city of Mobile, ninety feet west of Commerce street, thence running west on said street sixty-three feet, to the premises of Robertson, Bealle & Co., having a depth [of] seventy-six feet. Also a house and lot on the north side of Saint Louis street in said city, between Jackson and Claiborne streets, commencing eighty-seven and a-half feet west from Jackson street, thence running west on Saint Louis street sixty-eight feet, having a depth of one hundred and ten feet. Also a house and lot at the northwest corner of Church and Saint Joachim streets in said city, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on Saint Joachim street. Also a house and lot situate on the south side of Government street in said city, having a front of one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Government and Lawrence streets; and thence running east the said distance of one hundred feet on Government street, and known as the Acre house. Also a vacant

lot on the south side of Government street in said city, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet. Also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty six feet. Also four vacant lots on the north side of Government street in same city, between Franklin and Hamilton streets, having a front of fifty feet on Government street, equal to two hundred and twenty feet, by a depth of one hundred and two feet. Also a vacant lot in the rear of the above, having a front of sixty-six feet on Hamilton street, by a depth of one hundred and ten feet.

Also three lots, including a three-story brick dwelling and out-houses, on the north side of Government street, in said city, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet. Also fifty-four acres of ground in Mobile county, situate on the west side of Mobile bay, called and known as Frescati, bounded on the east by said bay, on the south by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from said Dog river road to the bay, with the buildings and appurtenances thereon. Also two three-story brick dwellings, with stores underneath, on the north side of Government street in said city, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel. Also eight four-story brick dwellings, with stores underneath, on the south side of Government street, in said city, commencing fifty-two feet from the southeast corner of Government street and Royal street, having a front of twenty-six feet each, extending east towards Water street two hundred and eight feet, by a depth of one hundred feet. Also nine lots, twenty-four feet front each, whereon stands the Mobile steam cotton press with brick cotton sheds, having a front on the west side of Water street two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine. Also ten lots, of twenty-four feet six inches each, on the east side of Royal street, between Government and Church streets, in said city, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick. Also ten vacant lots, each twenty-eight feet front, on the north side of Saint Francis street, in said city, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet. Also a lot fronting thirty-four feet on Joachim street, in said city, by a depth of one hundred and sixty feet, in the rear of the above. Also a lot fronting thirty feet on St. Joachim street, in said city, in the rear of the above mentioned ten lots, between Joachim and Jackson streets, and one hundred and twenty feet deep. Also an entire square, bounded by Maine, Water, Royal, and Massachusetts streets, having three hundred and fifty feet on Maine and Massachusetts

streets, in said city; and a water lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the Mobile river, with a wharf thereon three hundred and twenty feet by ninety feet. Also a house and lot on the northwest corner of Saint Emanuel and Eslava streets, in said city, fronting sixty feet on Saint Emanuel street, by a depth of one hundred and thirty feet. Also a house and lot at the northwest corner of Saint Louis and Jackson streets, in said city, eighty-five feet front on Saint Louis street, by a depth of one hundred and twenty feet, together with all and singular the buildings, improvements, hereditaments, rights, members, and privileges, and appurtenances, to all and singular the mentioned and described land and premises belonging or in any wise appertaining.

Also all and singular that piece, parcel, or tract of land, lying and being situate in the county of Mobile aforesaid, commencing at the southwest corner of Joseph W. Moore's land on the road leading from the city of Mobile to Springhill, commonly called the Springhill road, on the north side of said road, and running with said road to an iron bolt designating the southeast corner of a lot of land sold by Abner S. Lipscomb to Edward Dunning; thence northwardly with the line of said Dunning, fourteen chains and forty-three links; thence eastwardly to the western boundary of Joseph W. Moore's land, to the place of beginning, containing about six acres and seven tenths of an acre, together with all the rights, members, privileges, and appurtenances belonging or in any wise appertaining to the same.

Also all that certain piece, parcel, or lot of land situate, lying, and being in the city of Mobile aforesaid, beginning at a point on the west side of Commerce street, at the distance of thirty feet and two-thirds of an inch from the south side of Saint Louis street; thence westwardly, ninety feet four inches from the said Commerce street, to a point distant southerly thirty feet seven and one-third inches from Saint Louis street; thence southerly, five feet ten and two-third inches, to a point distant westerly ninety feet and four inches from Commerce street; thence westerly to a point distant southerly thirty-six feet six inches from Saint Louis street; thence southerly twenty-four feet eight and two-third inches to a point distant westerly ninety-three feet four inches from Commerce street; thence easterly to a point on the west side of Commerce street distant southerly thirty feet and two-thirds of an inch from the point of beginning; said lot bounded east by Commerce street, on which it fronts said thirty feet and two-thirds of an inch, north by William Jones, junior, and on the west and south by lands now or late of Rugely and Harrison; excepting and reserving to William Jones, junior, the right of way and of stairway as is expressed and set forth in a deed granting said right of way and stairway from William Wallace to the said William Jones, junior, dated the seventh day of March, A. D. 1836. Also all that certain piece, parcel, or lot of land, situate, lying, and being in said city, and described as following, to wit, bounded on the north by a store and lot now or lately belonging to W. F. Cleveland, on the east by the property of L. X. Huder, on the south by Planter's street, and on the west by Water street, having a

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front on Water street of twenty-eight feet, and running eastwardly with the same width fifty feet, more or less, to the property of the said L. X. Huder, and being the same premises which L. X. Huder and wife granted and conveyed to James and Charles Gascoigne by deed dated the eighteenth day of February, A. D. 1835, recorded in the office of the clerk of the county court of Mobile county, in book N, pages 243, 244.

Also all that certain lot or parcel of land lying and being in said city, described as follows, to wit, bounded on the east by Catharine street, on the west by lands belonging to the legal heirs of George W. Hilliard, late of said county, deceased; on the south by the new Springhill road, and on the north by lands of Wm. D. Stone; the said tract, parcel, or lot of land and premises measuring and containing six hundred and twenty-six feet six inches in front on the west side and line of said Catharine street, which is the eastern boundary thereof; also six hundred and thirty feet on the line of its western boundary; the said lands belonging to the said heirs of the said Hilliard; three hundred and forty-two feet at the south line thereof, which points on the north side of the said new Springhill road, and four hundred and fourteen feet on the northern boundary thereof, which is the south line of lands belonging to Wm. D. Stone. Also all the undivided moiety or half part of that certain piece, parcel, or lot of land and premises attached, situate, lying, and being in said city, and described as follows, said lot being on the south side of Saint Anthony street, containing forty-five feet more or less front, by eighty-two feet deep, bounded on the north by Saint Anthony street, on the west by lands belonging to J. B. Toulmin, on the south by lands now or lately belonging to Thomas M. English and George J. Gains, and on the east by lands now or late belonging to John Byrnes and son.

Also all that piece, parcel, or tract of land, lying and being in Mobile county aforesaid, with the premises thereunto attached, described as follows, the west half of the northeast quarter of section number twenty-two, township number four south, range number two west, containing eighty $\frac{10}{100}$ acres, and being situate within the district of public lands for sale at Saint Stephen's, Alabama, together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances unto all the above mentioned and described premises belonging, or in anywise appertaining. To have and to hold the above granted and described premises, with the appurtenances, unto the said parties of the second part, the survivor and survivors of them, and the heirs, executors, administrators, and assigns of such survivor forever.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

J. COWPERTHWAITE, [SEAL.]
REBECCA COWPERTHWAITE, [SEAL.]
T. DUNLAP, [SEAL.]
A. W. DUNLAP, [SEAL.]
HERMAN COPE, [SEAL.]
MARY COPE. [SEAL.]

Signed, sealed, and delivered in presence of——twelve words in the 11th and 12th lines first obliterated.

F. W. HUBBELL.
B. GERHARD.

CITY OF PHILADELPHIA, *State of Pennsylvania.*

Be it remembered, that on this the eighth day of September, in the year one thousand eight hundred and forty-one, before me, Benjamin Gerhard, commissioner of the State of Alabama, &c., for the State of Pennsylvania, personally appeared Joseph Cowperthwaite and Rebecca, his wife, Thomas Dunlap and Ann W., his wife; Herman Cope and Mary, his wife, parties to the above written deed, and acknowledged that they, and each of them, signed, sealed, and delivered the said deed, on the day and year therein mentioned, to the aforesaid James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell. And the said Rebecca, Ann W., and Mary, being each of them of full age, and by me privately examined apart from their said husbands, and the full contents thereof by me made known to them, did each of them declare, that she signed, sealed, and delivered the same, as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband.

Given under my hand and seal, this the eighth day of September, one thousand eight hundred and forty-one.

B. GERHARD, *Com'r.* [SEAL.]

THE STATE OF ALABAMA, *Mobile county.*

I, Drury Thompson, clerk of the county court of said county, certify, that the foregoing is a transcript of the record of a deed from Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, to James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, as recorded in my office, in book No. 2, pages 627, 628, 629, 630, 631, 632, and 633.

Given under my hand and seal of office, this sixteenth day of December, A. D. 1847.

D. THOMPSON, *Clerk.*

Exhibit E.—Original bill.

SOUTHERN CHANCERY DIVISION,
County of Mobile, first district.

To the honorable the chancellor of the first district of the southern chancery division of the State of Alabama.

The bill of complaint of Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, respectfully showeth, that heretofore, to wit, on the fourteenth day of July, A. D. 1838, at the county aforesaid, one Henry Hitchcock being indebted to your orators in the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with interest thereon from the first day of March, A. D. 1838, at the rate of eight per centum per annum, said interest payable semi-annu-

ally on the first days of September and the first days of March, each and every year, until the entire principal shall be paid; and the said principal of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents to be payable in five annual instalments, as follows, to wit, on the first day of March, A. D. 1839, two fifths of the said principal; and on the first day of March, A. D. 1840, one-fifth thereof; and on the first day of March, A. D. 1841, one other fifth thereof; and on the first day of March, A. D 1842, the other and remaining fifth of said principal; the payments of the said interest semi-annually as aforesaid, and of the said instalments as aforesaid, to be made in the city of New-York, at the times and in the manner above specified by his, the said Henry Hitchcock's, bond or writing obligatory, bearing date the day and year last aforesaid, and signed and sealed by the said Henry Hitchcock; which said bond or writing obligatory your orators are ready to produce under your honor's direction; the better to secure to your orators the payment of the said sum of money in the said bond or writing obligatory mentioned, the said Henry Hitchcock and Anne, his wife, on the day and year first above mentioned, executed to your orators a certain deed of mortgage, whereby they conveyed to your orators the following described real estate, that is to say, all those pieces and parcels of land, lying and being in the city of Mobile, and which are described as follows, to wit: three lots, with three four-story brick stores, with granite fronts thereon, beginning at a point on the south side of St. Francis street, ninety feet west of Commerce street; thence running west on said street sixty-three feet, to the premises of Robertson, Beal & Co., having a depth of seventy-six feet, valued at seventy-five thousand dollars. Also a house and lot on the north side of St. Louis street, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street, thence running west on St. Louis street sixty-eight feet, having a depth of one hundred and ten feet, valued at fifteen thousand dollars. Also a house and lot at the northwest corner of Church and St. Joachim streets, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on St. Joachim street, valued at twelve thousand dollars. Also a house and lot situate on the south side of Government street, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house, valued at ninety-five thousand dollars. Also a vacant lot on the south side of Government street, having sixty-six feet front on said steet, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet, valued at twelve thousand dollars. Also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet, valued at five thousand dollars. Also four vacant lots on the north side of Government street, between Hamilton and Franklin streets, having a front of fifty feet on Government

street, equal to two hundred and twenty feet, by a depth of one hundred and two feet, valued at thirty-three thousand dollars. Also a vacant lot in the rear of the above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet, valued at six thousand dollars. Also three lots, including a three story brick dwelling and out-houses, on the north side of Government street, at the north-east corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet, valued at fifty five thousand dollars. Also fifty-four acres of ground on the west side of Mobile bay, called and known as Prescati, bounded on the east by said bay; on the south by lands of James Innerarity; on the west by Dog river road; and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon, valued at fifty thousand dollars. Also two three-story brick dwellings, with stores underneath, on the north side of Government street, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel, valued at forty thousand dollars. Also eight four-story brick dwellings, with stores underneath, on the south side of Government street, commencing fifty-two feet from the southeast corner of Government street and Royal street, having a front of twenty-six feet each, extending east towards Water street, two hundred and eight feet, by a depth of one hundred feet, valued at two hundred thousand dollars. Also nine lots, twenty feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine, valued at one hundred and eleven thousand dollars. Also ten lots of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick, valued at seventy-three thousand two hundred dollars.

Also ten vacant lots, each twenty-eight front on the north side of St. Francis street, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet, valued at fifty thousand dollars. Also a lot fronting thirty-four feet on Joachim street, by a depth of one hundred and sixty-feet, in the rear of the above, valued at six thousand dollars. Also a lot fronting thirty feet on Joachim street, in the rear of the said above mentioned ten lots between Joachim and Jackson streets, and one hundred and twenty feet deep. Also one entire square, bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets, in said city, and a water lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon three hundred

and twenty feet by ninety feet. Also a house and lot at the northwest corner of St. Emanuel and Eslava streets, fronting sixty feet on St. Emanuel street, by a depth of one hundred and thirty feet, valued at twenty-five thousand dollars. Also a house and lot at the northwest corner of St. Louis and Jackson streets, eighty-five feet front on St. Louis street, by a depth of one hundred and twenty feet, valued at twenty-five thousand dollars; which said indenture of mortgage is subject to the following condition, that if the said Henry Hitchcock should well and truly pay to your orators the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with eight per cent. interest per annum, from the first day of March, A. D. 1838, thereon accruing, payable semi-annually according to the condition of a certain bond made by the said Henry Hitchcock to your orators, and bearing date with the said indenture of mortgage, then the said bond and indenture of mortgage should be void; and your orators respectfully represent to your honor that the said Henry Hitchcock wholly failed to comply with the conditions of the said bond and mortgage, and that the said sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, and the interest thereon as aforesaid, are wholly due and unpaid, whereby the said bond and mortgaged have become forfeited; and your orators further represent that the said Henry Hitchcock departed this life in the summer of 1839, and by his last will and testament devised all his estate, real, personal, and mixed, to his wife, Anne Hitchcock, whereby she became entitled to redeem the said mortgage; that by a certain indenture of release bearing date the day of , A. D. 1840, the said Anne Hitchcock remised and released to your orators all her equitable interest and legal title to the said mortgaged premises, and put your orators into peaceful possession of the said premises, which your orators still keep and enjoy. But your orators further show to your honor that Isaac H. Erwin has been appointed by the orphan's court of Mobile county administrator of the estate of the said Henry Hitchcock according to the will annexed, and although your orators are as aforesaid in possession of the said premises. Yet the said Isaac H. Erwin has, or may have, or pretend to have, some right to redeem the said mortgage; and your orators desire to have their title in said premises quieted and assured. Your orators therefore pray your honor to take their case into consideration, and to inquire into the allegations of this their bill, and to order and decree that, unless the said Isaac H. Erwin, administrator as aforesaid, shall, within such time as your honor may limit and appoint, pay and satisfy to your orators all principal and interest which may appear to be due to them on said bond and mortgage, a reference to the register of this honorable court, to be ordered for the ascertainment of what sum may be so due, that then the equity of redemption in the premises aforesaid, which was of the said Henry Hitchcock, and may now be in his personal representative, and all equity of redemption in the said premises which ever was in the said Hitchcock, and is claimed or derived through or under him by all, any, or every person or persons whatever, be forever barred and foreclosed. And

your orators pray that the writ of subpœna may issue, directed to the said Isaac H. Erwin, administrator as aforesaid, commanding him to be and appear before your honor on a day and place to be therein named, well and truly to answer all and singular the matters and things contained in this your orator's bill, and such other and further relief as to your honor may seem meet and conformable to equity and good conscience; and your orators, as in duty bound, will ever pray.

GIBBONS & FISHER,
Solicitors for complainants.

Filed 17th April, 1840.
Filed 25th May, 1840.

M. J. McRAE, *Register.*

Amended and supplemental bill.

STATE OF ALABAMA,
Southern chancery division, first district, county of Mobile.

To the honorable the chancellor of the first district of the southern chancery division of the State of Alabama, this the amended and supplemental bill of complaint of Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, by leave of your honorable court first had, respectfully sheweth, that heretofore, in the spring term of your honorable court, in the present year, your orators exhibited their bill in this cause against Isaac H. Erwin, the administrator of the estate of Henry Hitchcock, deceased, wherein and whereby your [orators] respectfully shew, that heretofore, to wit, on the 14th day of July, 1838, at the county aforesaid, the said Henry Hitchcock being indebted to your orators in the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with interest thereon from the first day of March, A. D. 1838, at the rate of eight per centum per annum, said interest payable semi-annually on the first days of September and March, in each and every year until the entire principal shall be paid; and the said principal of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, to be payable in five annual instalments as follows, to wit, on the first day of March, A. D. 1839, two-fifths of the said principal; and on the first day of March, A. D. 1840, one fifth thereof; and on the first day of March, A. D. 1841, one other fifth thereof; and on the first day of March, A. D. 1842, the other and remaining fifth thereof; the said payments of principal and interest as aforesaid to be made in the city of New York, at the times and in the manner above specified by his, the said Henry Hitchcock's bond or writing obligatory, bearing date the day and year last aforesaid, and signed and sealed by the said Henry Hitchcock; which said bond or writing obligatory your orators are ready to produce under your honors' direction; and that the better to secure to your orators the payment of the said sum of moneys in the said bond or writing obligatory, the said Henry Hitchcock and Anne, his wife, on the day and year first above mentioned, executed to your orators a certain deed of mortgage whereby he conveyed to your orators the following described real es-

tate, that is to say, all those pieces and parcels of land lying and being in the city of Mobile, and described as follows, to wit: three lots, with three four-story brick stores, with granite fronts thereon, beginning at a point on the south side of St. Francis street, ninety feet west of Commerce street, thence running west on said street sixty-three feet to the premises of Robertson, Beal & Co, having a depth of seventy-six feet, valued at seventy-five thousand dollars; also a house and lot on the north side of St. Louis street, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street, thence running west on St. Louis street sixty-eight feet, having a depth of one hundred and ten feet, valued at fifteen thousand dollars; also a house and lot at the northwest corner of Church and St. Joachim streets, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on St. Joachim street, valued at twelve thousand dollars; also a house and lot situate on the south side of Government street, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house, valued at twenty-five thousand dollars; also a vacant lot on the south side of Government street, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet, valued at twelve thousand dollars; also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet, valued at five thousand dollars; also four vacant lots on the north side of Government street, between Hamilton and Franklin streets, having a front of fifty feet on Government, each, equal to two hundred and twenty feet, by a depth of one hundred and ten feet, valued at thirty-three thousand dollars; also a vacant lot in the rear of the above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet, valued at six thousand dollars; also three lots, including a three-story brick dwelling and out-houses, on the north side of Government street, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet, valued at fifty-five thousand dollars; also fifty four acres of ground on the west side of Mobile bay, called and known as "Frescati," bounded on the east by said bay, on the south by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon, valued at fifty thousand dollars; also two three-story brick dwellings with stores underneath, on the north side of Government street between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel, valued at forty thousand dollars.

Also eight four story brick dwellings with stores underneath, on the

south side of Government street, commencing fifty-two feet from the southeast corner of Government street and Royal street, having a front of twenty-six feet, and extending east towards Water street, two hundred and eight feet, by a depth of one hundred feet, valued at two hundred thousand dollars. Also nine lots, twenty-four feet front each, whereon stands the Mobile cotton steam press, with brick cotton sheds, having a front on the west side of Water street two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church; that including a steam engine, valued at one hundred and eleven thousand dollars. Also ten lots of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick, valued at seventy-three thousand two hundred dollars. Also ten vacant lots, each twenty-eight feet front on the north side of Saint Francis street, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet, valued at fifty thousand dollars. Also a lot fronting thirty-four feet on Joachim street, by a depth of one hundred and sixty feet in the rear of the above, valued at six thousand dollars. Also a lot fronting thirty feet on Jackson street, in the rear of the above mentioned ten lots between Joachim and Jackson streets, and one hundred and twenty feet deep. Also an entire square bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets in said city; and a water lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon, three hundred and twenty feet by ninety feet. Also a house and lot at the northwest corner of St. Emanuel and Eslava streets, fronting sixty feet on St. Emanuel street, by a depth of one hundred and thirty feet, valued at twenty-five thousand dollars. Also a house and lot at the northwest corner of Saint Louis and Jackson streets, eighty-five front on Saint Louis street, by a depth of one hundred and twenty feet, valued at twenty-five thousand dollars; which said indenture of mortgage is subject to the following conditions: That if the said Henry Hitchcock should well and truly pay to your orators the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with eight per cent. interest per annum, from the first day of March, A. D. 1838, thereon accruing, payable semi-annually, according to the conditions of a certain bond made by the said Henry Hitchcock to your orators, and bearing date evenly with the said indenture of mortgage, [then the said bond and indenture of mortgage] should be void; which said bond and mortgage your orators are ready to produce under the direction of your honorable court. And your orators respectfully represent to your honor, that the said Henry Hitchcock wholly failed to comply with the condition of the said bond and mortgage, and that the said sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, and the interest thereon as aforesaid, are wholly due and unpaid, whereby the said bond and mortgage have become forfeited.

And your orators further represent, that the said Henry Hitchcock departed this life in the summer of 1839, and by his last will and testament devised all his estate, real, personal, and mixed, to his wife, Anne Hitchcock, whereby she became entitled to redeem the said mortgage; and that by a certain indenture of release, bearing date the eighth day of February, 1840, the said Anne Hitchcock remised and released to your orators all her equitable interest and legal title to the said mortgaged premises, and put your orators into peaceful possession of the said premises, which your orators still keep and enjoy. But your orators further show to your honor, that Isaac H. Erwin has been appointed, by the orphan's court of Mobile county, administrator of the estate of the said Henry Hitchcock with the will annexed. And although your orators are as aforesaid in possession of the said premises, yet the said Isaac H. Erwin has, or may have, or pretend to have, some right to redeem the said mortgage; and your orators desire to have their title in said premises quieted and assured. Your orators therefore pray that your honor will take their case into consideration, and to inquire into the allegations of this their bill, and to order and decree that unless the said Isaac H. Erwin, administrator as aforesaid, shall, within such time as your honor may limit and appoint, pay and satisfy to your orators all principal and interest which may appear to be due to them on said bond and mortgage, on a reference to the register of this honorable court, to be ordered for the ascertainment of what sum may be so due, that then the equity of redemption in the premises aforesaid, which was of the said Henry Hitchcock, and may now be in his personal representative, and all equity of redemption in the said premises which ever was in said Hitchcock, and is claimed or derived by, through, or under him, by all or any person or persons whatever, may be forever barred and foreclosed.

And your orators now respectfully shew to your honor for amendment and supplemental to this their original bill of complaint, that they are the trustees of the president, directors, and company of the Bank of the U. States, to whom the aforesaid sum of money, due from the said Henry Hitchcock, is payable; and your orators therefore pray that the said the president, directors, and company of the Bank of the United States may be made parties complainants jointly with your orators to this their amended and supplemental bill; and your orators further shew, that their above recited original bill was filed amicably, and with an express agreement between your orators and the agents of the said Anne Hitchcock, devisee as aforesaid, that your orators should have, under a decree of your honorable court, a confirmation of peaceful and perfect possession of said mortgaged premises; that, during the lifetime of the said Henry Hitchcock, and after the said bond and mortgage were forfeited, your orators exhibited their bill of complaint in your honorable court against the said Henry Hitchcock, praying a decree of foreclosure of his equities in the said premises; that the said Henry Hitchcock, in reply thereto, among other matters, plead that the contract, out of which the said indebtedness from him to your orators arose, was usurious, and forbidden by the laws of Alabama; and that, therefore, the afore-

said bond and mortgage were void and of no effect; that, while the said bill was pending, and the said plea was undecided, the said Henry, being in negotiation with your orators for an adjustment and settlement of the controversy so existing between them, and the payment of the said indebtedness by a transfer of real estate, departed this life, leaving a last will and testament, whereby he appointed the said Anne Hitchcock his executrix, and constituted her his sole devisee of all his estate, real, personal, and mixed, with a power to dispose of the same by public or private sale for the purpose of paying his debts. Your orators further show unto your honor, that the said above described mortgaged premises are almost without exception improved rentable property—the aggregate rent of which may be estimated at fifty thousand dollars or upwards; that the said Henry Hitchcock, in his lifetime, always expressed the determination to pay to your orators the aforesaid indebtedness, so expressed in the bond and mortgage, by a transfer of the mortgaged property, and that he expressed this determination as well before as after the filing of the said plea above mentioned, and always professed up to the time of his death willingness to meet your orators upon fair terms for the payment of the said debt by transferring property as aforesaid. Your orators further shew unto your honor, that after the death of the said Henry Hitchcock, in contemplation of the delay that would ensue in consequence thereof, if your orators were to be exposed to the litigation of the aforesaid plea through its several successive tribunals, and your orators be, during that course of litigation, deprived of the aforesaid rents and profits, your orators' security under the said mortgage and its use for the present payment of interest even on the said debt, would be greatly impaired. Your orator, Herman Cope, came to the city of Mobile for the purpose of negotiating with the representatives of the said Henry Hitchcock, in order that your orators, by putting an end to the controversy between them and the said Hitchcock's estate, might at once go into peaceful enjoyments of the rents of said premises. Your orator, Herman Cope, acting as the agent of the said president, directors, and company of the Bank of the United States, had accordingly many interviews with one James Erwin, the brother of Anne Hitchcock, the devisee aforesaid, and who represented himself to your orator, Herman Cope, as being fully authorized by Mrs. Hitchcock, and those interested in the estate, to treat with your said orator on the subject of a settlement of the controversy aforesaid, and to make with your orator agreements binding upon the representatives of the said Henry Hitchcock. Your orator, Cope, had previously negotiated with the said James Erwin on the same subject during the lifetime of the said Henry Hitchcock, who then fully empowered the said Erwin to act for him, and to bind him in the premises; and your orator, Cope, expressly charges that the said James Erwin was fully authorized by the said devisee to make with your orators the agreement and settlement of the said controversy, which your orators will presently show. Your orator, Cope, now respectfully shows and charges, that the agreement and compromise of the said controversy, made between him and the said James Erwin, acting for the said Hitchcock's representatives,

was as follows: That the said Erwin represented to your orator that the estate of the said Hitchcock was largely insolvent, and that there were creditors to a great amount wholly unprovided with any security for their debts; that these claims upon the estate could be all paid to the satisfaction of the claimants by the sum of one hundred and fifty thousand dollars; that the representatives of the said Hitchcock, deceased, were entirely willing that your orators should enter upon and enjoy the premises so far as they had any interest in said lands, but that they could not consent that your orators, by thus taking possession of the premises, should be paid their debt in full, while so many creditors were unprovided with security, and the estate insolvent; that if your orators would pay for the benefit of these unsecured creditors the said sum of one hundred and fifty thousand dollars, your orators should enter into the said premises under a conveyance from the devisee, and should enjoy the same without hinderance or molestation by or from the representatives of the said Hitchcock, deceased; that the said bill, so as aforesaid filed by your orators against the said Hitchcock in his lifetime, with all the proceedings thereupon, should continue to be abated and never be revived, and that the devisee should decline to take upon herself the execution of the said last will and testament, but that a friendly administrator should be appointed by the concurrence of your orators and the representatives of said Hitchcock, deceased, who should acquire in the final adjustment and settlement thus to be made, and permit to your orators the unmolested possession contracted for; your orators further respectfully show, that confiding in these representatives, they did pay into the hands of the said James Erwin the sum of one hundred and fifty thousand dollars, to be applied by him to the payment of the said unsecured debts; that the devisee did, as set out in your orator's original bill, by deed of release, convey to your orators all her legal and equitable estate in the said premises, and your orators executed to her a release of all demands against the said Hitchcock's estate, saving such as remained and were reserved under the said mortgage; and your orators believe they were in possession of the said premises as well by the said deed of release as by an assignment by the said devisee of all the leases of said premises to your orators; and by the contract of the said James Erwin, so as aforesaid made and undertaken, and in pursuance of said agreement, and in accordance with your orators' supposed possession, your orators filed their said original bill; and your orators further shew, that the said James Erwin, some time before the said last named negotiation between him and your orator Cope, had purchased at sheriff's sale the residuary interest of the said Henry Hitchcock in the eight stores so as aforesaid mortgaged to your orators, which were levied upon as the property of said Hitchcock; that said Erwin, as your orators are informed, paid for the said purchase the sum of fifty dollars, and took the sheriff's deed; that the said Erwin afterwards informed your orators that he made the said purchase for the purpose of strengthening his position in the negotiation so as aforesaid undertaken between him and your orators, and under the belief that by holding what he sup-

posed to be an antagonist title, your orators would more willingly come into such terms as he would propose; now, your orators, referring your honor to the said deed of mortgage, respectfully shew, that the said eight stores are valued therein at two hundred thousand dollars, and as security for that sum were accepted by your orators; but your orators further shew unto your honors, that after the said agreement was concluded upon, so far as the payment of the said sum of one hundred and fifty thousand dollars, and the other conditions as aforesaid, the said James Erwin agreed also to give to your orators, as one of the means of the quiet enjoyment and possession of said premises, whatever title he had derived by his purchase, it being in your orators' opinion no more than the equity of redemption of the said Henry Hitchcock; and your orators further shew that the said James Erwin was very desirous that the real terms of the settlement made between your orators and the representatives of the said Hitchcock by the intervention of said James Erwin should be concealed from the public, in order, as he said, that he should be more at liberty in using the said sum of one hundred and fifty thousand dollars in paying the said unsecured creditors; and with this view he proposed to your orators to make the consideration money expressed on the face of his said deed releasing the said sheriff's title in the eight stores aforesaid, the said sum of one hundred and fifty thousand dollars, to which your orators assented and took the deed; but your orators expressly reassert and charge that the said sum of one hundred and fifty thousand dollars was paid as the consideration of the aforesaid agreement, by which all real or supposed defences which might exist, or have existed, against the said bond and mortgage, were to be forever abandoned and relinquished, your orator put into peaceful possession, to be enjoyed unmolested, and the money so paid to be applied to the payment of the unsecured creditors; and your orators further shew, that the said Isaac H. Erwin, so as aforesaid appointed administrator of the said estate, was appointed by the concurrence of your orators, the said devisee, and the said James Erwin, as a friendly administrator to carry out the terms of said agreement; but your orators respectfully shew, that after payment by them of the said sum of money and the appointment of said Isaac H. Erwin as administrator as aforesaid, he, the said Isaac, by every means in his power, molested and disturbed your orators' possession of the said premises, by publicly advertising that your orators were not in the possession of the said premises, and also by cautioning the tenants of the premises not to pay any rent to your orators or their agent; and your orators further represent, that he still does so molest and interrupt the rights of your orators in the premises; and further, although not authorized by law, he, the said Isaac, has gone on to lease divers portions of the said premises, and to receive the rents thereof, to the entire violation of the said agreement with your orators, and to the defeat and destruction of their present security; all of which actings and doings are contrary to equity and good conscience; and your orators respectfully pray your honor to take their case into consideration, and to order that the said Anne Hitchcock, widow of the said Henry Hitchcock, and Caroline Hitchcock,

Henry Hitchcock, Andrew Hitchcock, and Ethan A. Hitchcock, children, infants of the said Henry and Anne Hitchcock, may be made parties defendants to this your orators' amended and supplemental bill; and that your honor will order and decree as is prayed in your orators' said original bill; and that, in the mean time, your honor will grant your orators the writ of injunction, issuing out of your honorable court, to restrain the said Isaac H. Erwin from intermeddling in any way with the said mortgaged premises, or the rents and profits thereof; and that the process of subpœna may issue to the said Isaac H. Erwin, Anne Hitchcock, Caroline Hitchcock, Henry Hitchcock, Andrew Hitchcock, Anne E. Hitchcock, and Ethan A. Hitchcock, commanding them to be and appear before your honor at a day and place to be therein named, well and truly to answer all and singular the matters and things contained in this your orators' bill, and for such other and further relief as to your honor may seem meet; your orators, as in duty bound, will ever pray.

GIBBONS & FISHER,
Sol's for compl'ts.

Samuel Griffitts Fisher, being duly sworn, says the facts set forth in the foregoing bill are true.

S. GRIFFITTS FISHER.

Attest:
M. J. McRAE, *Reg.*
Filed 28th Nov., 1840.

M. J. McRAE, *Reg.*

Second amended bill.

To the honorable the chancellor of the first district of the southern chancery division of the State of Alabama, this the amended and supplemental bill of Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, and the president, directors, and company of the Bank of the United States, by leave of your honor first had and obtained, respectfully showeth: that heretofore, to wit, at the fall term of your honorable court, in the year of our Lord 1840, your orators filed and exhibited, by leave of your honor, an amended and supplemental bill in this cause, whereby it was shown to your honor as follows, that at the spring term of your honorable court, in the said year, your orators, Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, exhibited their original bill in this cause against Isaac H. Erwin, the administrator of the estate of Henry Hitchcock, deceased, wherein and whereby your orators respectfully showed that heretofore, to wit, on the fourteenth day of July, 1838, at the county of Mobile, the said Henry Hitchcock being indebted to your orators in the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with interest thereon from the first day of March, A. D. 1838, at the rate of eight per cent. per annum, said interest payable semi-annually on the first days of September and March, in each and every year, until the entire principal shall be paid; and the said principal of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, to be payable in five annual instalments, as follows, to wit,

on the first day of March, A. D. 1839, two-fifths of the said principal; and on the first day of March, A. D. 1840, one-fifth thereof; and on the first day of March, A. D. 1841, one-fifth thereof; and on the first day of March, A. D. 1842, the other and remaining one-fifth thereof; the said payments of principal and interest as aforesaid to be made in the city of New York, at the times and in the manner above specified by him, the said Henry Hitchcock, in bond or writing obligatory, bearing date the day and year last aforesaid, and signed and sealed by the said Henry Hitchcock, which said bond or writing obligatory your orators are ready to produce under your honor's direction; and that the bill to secure to your orators the payment of the said sum of money in the said bond or writing obligatory, made [by] the said Henry Hitchcock and Anne, his wife, on the day and year first above mentioned, executed to your orators a certain deed of mortgage, whereby he conveyed to your orators the following described real estate, that is to say, all those pieces and parcels of land lying and being in the city of Mobile, and described as follows, to wit, three lots with three four-story brick stores, with granite fronts, thereon, beginning at a point on the south side of Saint Francis street, ninety-seven feet west of Commerce street; thence running west on said street sixty-three feet to the premises of Robertson, Beal & Co., having a depth of seventy-six feet, valued at seventy-five thousand dollars; also a house and lot on the north side of Saint Louis street, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street; thence running west on Saint Louis street sixty-eight feet, having a depth of one hundred and ten feet, valued at fifteen housand dollars; also a house and lot at the northwest corner of Church and Saint Joachim streets, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on Saint Joachim street, valued at twelve thousand dollars; also a house and lot situate on the south side of Government street, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house, valued at twenty-five thousand dollars; also a vacant lot on the south side of Government street, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet, valued at twelve thousand dollars; also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet, valued at five thousand dollars; also four vacant lots on the north side of Government street, between Hamilton and Franklin streets, having a front of fifty feet on Government street each, equal to two hundred and twenty feet, by a depth of one hundred and ten feet, valued at thirty-three thousand dollars; also a vacant lot in the rear of the above, having a front of sixty six feet on Franklin street, by a depth of one hundred and ten feet, valued at six thousand dollars; also three lots, including a three-story brick dwelling and out-houses, on the

north side of Government street, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet, valued at fifty-five thousand dollars; also fifty-four acres of ground on the west side of Mobile bay, called and known as "Frescati," bounded on the east by said bay, on the south by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon, valued at fifty thousand dollars; also two three-story brick dwellings with stores underneath, on the north side of Government street, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel, valued at forty thousand dollars; also eight four-story brick dwellings, with stores underneath, on the south side of Government street, commencing fifty-two feet from the southeast corner of Government street and Royal street, having a front of twenty-six feet each, extending east towards Water street two hundred and eight feet, by a depth of one hundred feet, valued at two hundred thousand dollars; also nine lots, twenty-four feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street two hundred and sixten feet, by a depth one of hundred and sixty-five on Church street, including a steam engine, valued at one hundred and eleven thousand dollars; also ten lots of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick, valued at seventy-three thousand two hundred dollars; also ten vacant lots, each twenty-eight feet front, on the north side of Saint Francis street, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet, valued at fifty thousand dollars; also a lot fronting thirty-four feet on Joachim street, by a depth of one hundred and sixty feet, in the rear of the above, valued at six thousand dollars; also a lot fronting thirty feet on Joachim street, in the rear of the said above mentioned ten lots between Joachim and Jackson streets, and one hundred and twenty feet deep; also an entire square, bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets, in said city; and a water lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon, three hundred and twenty feet by ninety feet; also a house and lot at the northwest corner of St. Emanuel and Eslava streets, fronting sixty-six feet on St. Emanuel street, by a depth of one hundred and thirty feet, valued at twenty-five thousand dollars; also a house and lot on the northwest corner of Saint Louis and Joachim streets, eighty-five [feet] front on St. Louis street, by a depth of one hundred and twenty feet, valued at twenty-five thousand dollars; which said indenture of

mortgage is subject to the following condition, that if the said Henry Hitchcock should well and truly pay to your orators the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with eight per cent. interest per annum, from the first day of March, A. D. 1838, thereon accruing, payable semi-annually, according to the condition of a certain bond made by the said Henry Hitchcock to your orators, and bearing date evenly with the said indenture of mortgage, then the said bond and indenture of mortgage should be void; which said bond and mortgage your orators are ready to produce under the direction of your honorable court; and your orators respectfully represent to your honor, that the said Henry Hitchcock wholly failed to comply with the conditions of the said bond and mortgage, and that the aforesaid sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, and the interest thereon as aforesaid, are wholly due and unpaid, whereby the said bond and mortgage have become forfeited. And your orators further represent, that the said Henry Hitchcock departed this life in the summer of the year 1839, and by his last will and testament devised all his estate, real, personal, and mixed, to his wife Anne Hitchcock, whereby she became entitled to redeem the said mortgage; that by a certain indenture of release, bearing date the eighth day of February, 1840, the said Anne Hitchcock remised and released to your orators all her equitable interest and legal title to the said mortgaged premises, and put your orators into peaceful possession of the said premises which your orators still keep and enjoy; but your orators further show to your honor that Isaac H. Erwin has been appointed by the orphan's court of Mobile county, administrator of the said Henry Hitchcock, with the will annexed; and although your orators as aforesaid, are in possession of the said premises, yet the said Isaac H. Erwin has, or may have, or may pretend to have, some right to redeem the said mortgage, and your orators desire to have their title in the said premises quieted and assured; your orators therefore pray, that your honor will take their case into consideration, and inquire into the allegations of this their bill, and order and decree that unless the said Isaac H. Erwin, administrator as aforesaid, shall within such time as your honor may limit and appoint, pay and satisfy to your orators all principal and interest which may appear to be due to them on said bond and mortgage, on a reference to the register of this honorable court, to be ordered for the ascertainment of what sum may be so due, that then the equity of redemption in the premises aforesaid, which was of the said Henry Hitchcock, and may now be in his personal representative, and all equity of redemption in the said premises which ever was in said Hitchcock, and is claimed or derived by, through, or under him, by all and every person or persons whatever, may be forever barred and foreclosed. And your orators now respectfully show to your honor, for amendment and supplement to this original bill of complaint, that they are the trustees of the president, directors, and company of the Bank of the United States, to whom the aforesaid sum of money due from the said Henry Hitchcock is payable; and

your orators therefore pray, that the said the president, directors, and company of the Bank of the United States may be made parties complainants jointly with your orators to this their amended and supplemental bill. And your orators further show, that their above recited original bill was filed amicably, and with an express agreement between your orators and the agents of the said Anne Hitchcock, devisee as aforesaid, that your orators should have under a decree of your honorable court a confirmation of peaceful and perfect possession of said mortgaged premises; that during the lifetime of the said Henry Hitchcock, and after the said bond and mortgage were forfeited, your orators exhibited their bill of complaint in your honorable court against the said Henry Hitchcock, praying a decree of foreclosure of his equities in the said premises; that the said Henry Hitchcock in reply thereto, among other matters, pleaded that the contract out of which said indebtedness from him to your orators arose, was usurious and forbidden by the laws of Alabama, and that therefore the said bond and mortgage were void and of no effect; that while said bill was pending, and the said plea undecided, the said Henry Hitchcock was in a negotiation with your orators for an adjustment and settlement of the controversy as existing between them, and payment of the said indebtedness by a transfer of real estate, departed this life, leaving a last will and testament, whereby he appointed the said Anne Hitchcock his executrix, and constituted her his sole devisee of all his estate, real, personal, and mixed, with power to dispose of the same by public or private sale, for the purpose of paying his debts. Your orators further shew to your honor that the said above described mortgaged premises are, almost without exception, improved rentable property, the aggregate rents of which may be estimated at fifty thousand dollars or upwards; that the said Henry Hitchcock, in his lifetime, always expressed the determination to pay your orators the aforesaid indebtedness, so expressed in the bond and mortgage, by a transfer of the mortgaged property, and that he expressed this determination as well before as after the filing of the said plea above mentioned, and always professed, up to the time of his death, his willingness to meet your orators upon fair terms for the payment of said debt by transferring property as aforesaid. Your orators further show unto your honor that, after the death of the said Henry Hitchcock, in contemplation of the delay that would ensue in consequence thereof, if your orators were to be exposed to the litigations of the aforesaid plea through its several successive tribunals, and your orators, during that course of litigation, be deprived of the aforesaid rents and profits, and your orators' security under the said mortgage, and its use for the present, payment of interest even on the said debt would be greatly impaired. Your orator, Hermon Cope, came to the city of Mobile for the purpose of negotiating with the representatives of said Hitchcock, in order that your orators, by putting an end to the controversy between them and the said Hitchcock's estate, might at once go into the peaceful enjoyment of the rents of said premises. Your orator, Hermon Cope, acting as the agent of the said the president, directors, and company of the Bank of the

United States, had accordingly many interviews with one James Erwin, the brother of Anne Hitchcock, the devisee aforesaid, and who represented himself to your orator, Hermon Cope, as being fully authorized by Mrs. Hitchcock, and those interested in the estate, to treat with your orator on the subject of the settlement of the controversy aforesaid, and to make with your orator agreements binding upon the representatives of the said Henry Hitchcock. Your orator had previously negotiated with the said James Erwin on the same subject during the lifetime of the said Henry Hitchcock, who then fully empowered the said James Erwin to act for him and bind him in the premises; and your orator Cope expressly charges that the said James Erwin was fully authorized by the said devisee to make with your orator the agreement and settlement of the controversy which your orators will presently show. Your orator Cope now respectfully shows and charges, that the agreement and compromise of the said controversy made between him and the said James Erwin, acting for the said Hitchcock's representatives, was as follows, that the said Erwin represented to your orator that the estate of said Hitchcock was largely insolvent, and that there were creditors to a great amount wholly unprovided with any security for their debts; that these claim upon the estate could be all paid to the satisfaction of the claimants by the sum of one hundred and fifty thousand dollars; that the representatives of the said Hitchcock, deceased, were entirely willing that your orators should enter upon and enjoy the said premises, so far as they had any interest in said lands; but that they could not consent that your orators, by thus taking possession, should be paid their debt in full, while so many creditors were unprovided with security, and the estate insolvent; that if your orators would pay for the benefit of the unsecured creditors the said sum of one hundred and fifty thousand dollars, your orators should enter into the premises under a conveyance from the devisee, and should enjoy the same without hindrance or molestation by or from the representatives of the said Hitchcock, deceased; that the said bill so as aforesaid by your orators against the said Hitchcock, in his lifetime, with all the proceedings thereupon, should continue to be abated and never be revived; and that the devisee should decline to take upon herself the execution of the said last will and testament, but that a friendly administrator should be appointed, by the concurrence of your orators and the representatives of the said Hitchcock, deceased, who should acquiesce in the final adjustment and settlement thus to be made, and present to your orators the unmolested possession contracted for; your orators further respectfully shew, that confiding in these representatives, they did pay into the hands of the said James Erwin the sum of one hundred and fifty thousand dollars, to be applied to the payment of the said unsecured debts; that the devisee did, as set out in your [orators'] original bill, by deed of release convey to your orators all her legal title and equitable estate in the said premises, and your orators executed to her a release of all demands against the said Hitchcock's estate, saving such as remained and were reserved under the said mortgage, and your orators believed they were in possession of the said premises, as well by the said deed of release as

by an assignment by the said devisee of all the leases of the said premises to your orators, and by the contract of the said James Erwin, so as aforesaid made and undertaken; and in pursuance of said agreement, and in accordance with your orator's supposed possession, your orators filed their said original bill; and your orators further shew, that the said James Erwin, some time before the said last named negotiation between him and your orator Cope, had purchased at sheriff's sale the residuary interest of the said Henry Hitchcock in the eight stores, so as aforesaid mortgaged to your orators, which were levied upon as the property of said Hitchcock; that said Erwin, as your orators are informed, paid for the said purchase the sum of fifty dollars, and took the sheriff's deed; that the said Erwin afterwards informed your orators, that he made the said purchase for the purpose of strengthening his position in the negotiation so as aforesaid undertaken between him and your orators; and that under the belief that by holding what he supposed to be an antagonist title your orators would the more willingly come into such terms as he would propose; now your orators, referring your honor to the said deed of mortgage, respectfully shew, that the said eight stores are valued therein at two hundred thousand dollars, and as security for that sum were accepted by your orators. But your orators further shew, that after the said agreement was concluded upon, so far as the payment of [the] one hundred and fifty thousand dollars, and the other conditions as aforesaid, the said James Erwin agreed also to give to your orators, as one of the means of the quiet enjoyment and possession of said premises, whatever title he had derived by his purchase, it being, in your orators' opinion, no more than the equity of redemption of said Hitchcock; and your orators further shew, that the said James Erwin was very desirous that the real terms of the settlement made between your orators and the representatives of the said Hitchcock, by the intervention of the said James Erwin, should be concealed from the public, in order, as he said, that he should be more at liberty in using the said sum of one hundred and fifty thousand dollars in paying the said unsecured debts; and with this view he proposed to your orators to make the consideration money expressed on the face of the said deed, releasing the said sheriff's title in the eight stores aforesaid, the said sum of one hundred and fifty thousand dollars, to which your orators assented and took the deed; but your orators expressly reassert and charge, that the said sum of one hundred and fifty thousand dollars was paid as the consideration of the aforesaid agreement, by which all real or supposed defences which might exist against the said bond and mortgage were to be forever abandoned and relinquished, your orators be put in peaceful possession, to be enjoyed unmolested, and the money so paid to be applied to the payment of the unsecured creditors; and your orators further shew, that the said Isaac H. Erwin, so as aforesaid appointed administrator of the said estate, was appointed by the concurrence of your orators and the said devisee, and the said James Erwin, as a friendly administrator, to carry out the terms of said agreement; but your orators respectfully shew, that soon after the payment by them of the said sum of money and the appoint-

ment of the said Isaac H. Erwin as administrator as aforesaid, he, the said Isaac, by every means in his power, molested and disturbed your orators' possession of the premises, by publicly advertising that your orators were not in possession of the said premises, and by cautioning the tenants of said premises not to pay any rents to your orators or their agents; and your orators further represent, that he still does so molest and interrupt the rights of your orators in the premises; and further, although not authorized by law, he, the said Isaac, has gone on to lease divers portions of the said premises, and to receive the rents thereof, to the entire violation of the said agreement with your orators, and to the defeat and destruction of their present security; and your orators by their said bill prayed that the said Anne Hitchcock, widow of the said Henry Hitchcock, and Caroline Hitchcock, Henry Hitchcock, Andrew Hitchcock, and Ethan A. Hitchcock, infants, children of the said Henry Hitchcock, deceased, should be made defendants to the said bill; that process of subpœna should issue to the said Isaac H. Erwin, administrator, and the said Anne, Caroline, Henry, Andrew, and Ethan A. Hitchcock, and that the said Isaac H. Erwin, administrator aforesaid, should be restrained by injunction from intermeddling with said mortgaged premises; and that your honor would grant the relief prayed by the original bill, and such other relief as is meet in the premises. And now, for further amendment and supplemental to their said bill, by leave of your honor first had and obtained, your orators, Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, and the president, directors, and company of the Bank of the United States, respectfully show, that both before and after the filing of their said original bill in this cause, the said Isaac H. Erwin respectfully recognised and acquiesced in the agreement so as aforesaid made between your orators, the said James Erwin and the said Anne Hitchcock, and at various times on the solicitation of your orators, by their agents, led your orators and their said agents to believe that he would presently carry the said agreement into effect; that he postponed the execution of the said agreement from time to time on various pretences, and endeavored to impose new conditions upon your orators, but that he never pretended to repudiate the said contract, except as before stated by interfering with and disturbing your orators' possession and the receipt of the said rents; and even at such time he acquiesced in the justness of the demands made by your orators, but pretended that some further delay was necessary before he could comply with them; that in the various conversations and negotiations which have taken place between the agents of your orators and the said Isaac H. Erwin, he has repeatedly represented that he could do nothing without the sanction and advice of his brother James Erwin, and has appeared to the agents of your orators to be guided and controlled in the management of the said estate wholly by the views and wishes of the said James Erwin; and your orators charge that the said Isaac H. Erwin did recognise as aforesaid the said agreement, and well knew the consideration on which the said sum of one hundred and fifty thousand dollars was so as aforesaid paid, to be the agreement set out by your

orators as aforesaid, and that the said sum was paid by your orators to be applied for the benefit of the unsecured creditors above specified; and your orators further beg leave to bring to the notice of your honor that the said bond and mortgage, so executed to your orators by the said Hitchcock, was for the security of certain debts theretofore due by the said Hitchcock to your orator, amounting to the sum of five hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, and the further sum of hundred thousand dollars, which was then presently advanced by your orators to the said Hitchcock, to be by him expended in improving the property mortgaged; and your orators shew that as an inducement to them to accept the said mortgage and make the said advance, the said Hitchcock expressly agreed to put the agent of your orators into the immediate possession of the rents and profits of the mortgaged property, which possession was an essential part and ingredient of the contract for said mortgage; and your orators advanced the said sum of one hundred thousand dollars, and it was expended in the improvement of the said mortgaged premises; but, as aforesaid set forth, the said Hitchcock never did put your orators or their agent into the possession and enjoyment of the said rents and profits, whereby and by the refusal of the said administrator to admit your orators to enjoy the same, their security under the said mortgage is greatly diminished, and the said contract of the said Hitchcock wholly unperformed; and your orators, Cowperthwaite, Dunlap, and Cope, further respectfully represent unto your honor, that since the filing of their aforesaid bill they have conveyed all their interest in the aforesaid mortgaged premises to James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, and they pray therefore that the said James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, may be made complainants to this the amended and supplemental bill; and the said James Dundas, Mordecai D. Lewis, Samuel W. Jones Robert L. Pitfield, and Robert Howell, pray that this may be taken and made their amended and supplemental bill as joint complainants with the said the president, directors, and company of the Bank of the United States, and that the names of the said Cowperthwaite, Dunlap, and Cope may be stricken therefrom; and your orators praying your honor take their case into consideration, pray for such relief as is before prayed, or for a sale of the said mortgaged premises for the payment of said debt, and for such other and further relief as is consistent with equity and good conscience; and that the process of this honorable court shall issue to the said Isaac H. Erwin, administrator as aforesaid, Anne Hitchcock, Caroline Hitchcock, [Henry Hitchcock,] Andrew Hitchcock, and Ethan A. Hitchcock, commanding them to be and appear before your honor to answer all and every the matters herein contained, on their corporal oaths, as fully, particularly, and specifically as if specially interrogated thereunto; and your orators, as in duty bound, &c.

S. GRIFFITHS FISHER,
Sol'r for complainants.

S. Griffithe Fisher, being duly sworn, says, that the facts set forth in the foregoing bill are true to the best of his knowledge and belief.

S. GRIFFITHS FISHER.

Sworn to and subscribed before me, this 29th day of Sept., A. D. 1841.

M. J. McRAE, *Reg.*

Filed September 29th, 1841.

M. J. McRAE, *Reg.*

Answer of Anne Hitchcock.

In the Mobile chancery court, first district, southern chancery division of Alabama.

The separate answer of Anne Hitchcock to the bill, amended bills, and amended and supplemental bills, against her and others, filed by Joseph Cowperthwaite, Thomas Dunlap, Hermon Cope, and others, in this honorable court. This respondent, saving and reserving all matters of exceptions to the many errors and uncertainties in said several bills contained, for answer thereto, or to so much thereof as she is advised it is necessary or material to answer, answering, states, that she knows nothing [of] her own knowledge of the indebtedness or supposed indebtedness of her late husband, Henry Hitchcock, to the complainant, or to the president, directors, and company of the Bank of the United States; all that she knows in relation to said matter she derived principally from her late husband, and all that she knows in relation to the consideration of the mortgaged deed mentioned in said complainant's bill she derived from the same source; in fact, her information in relation to said matter has been principally derived from the answer filed by her husband, in his lifetime, to a bill filed against him by said Cowperthwaite, Dunlap, and Cope; and *the* states that she believes said debt was contracted, continued, and renewed, and said mortgage was executed upon the consideration and in the manner stated in said answer. She hereby refers to a copy of said bill and exhibits and her husband's answer, marked exhibit A, which answer she particularly refers to as containing all the facts in relation to the various transactions which occurred between her late husband and the complainants. She states that she believes everything stated in said answer to be true, and she hereby adopts it as her answer to this bill, and prays that it may be deemed and taken by the court as a part of this her answer. She admits she joined her husband in said mortgage; that is, she signed and sealed it, and acknowledged it in the manner recited and stated on said mortgage. Whether by this act she legally released or relinquished her dower, she does not know; but submits said question entirely to the decision of this honorable court. So far as her interest is involved, she relies as a defence to this bill upon the facts stated by her husband in the answer filed by him as aforesaid, and which she has referred to and adopted as part of this her answer as aforesaid.

Respondent further answering states, that she admits that the said Henry Hitchcock departed this life in August, 1839, leaving a last will and several codicils, which were duly proved, as required by law, in the orphan's court of Mobile county—a true copy whereof she will procure, and *and* file as part of her answer; and when filed, she prays it may be so considered—B. In and by said will this respondent was appointed the executrix thereof, and sole devisee in trust of all testator's property, with power to sell the property and pay debts, &c. She, however, never did qualify as executrix under said will, but renounced the same; and administration, with the will annexed, was taken out by Isaac H. Erwin. The extent of the interest and power of this respondent under said will, and the effect of her renunciation, she submits to the decision of this honorable court.

This respondent further answering states, that, under the belief she had the right and power as executrix and devisee in trust under said will to compromise and pay debts, she did agree with said complainants to give up and to release to them, said Cowperthwaite, Dunlap, and Cope, all the interest which she, as devisee in trust under said will or as executrix, had in and to all the property mentioned and contained in the aforesaid mortgage, except eight stores, valued at $200,000, which stores had been purchased by James Erwin at execution sale, and were claimed by him. This respondent supposed and believed she had the right to make such compromise or sale; but whether she had such right it is for this honorable court to decide; the deed referred to by complainants in their bill is the one she executed and delivered to said Cowperthwaite, Dunlap and Cope; the sole consideration of said release or sale was the indebtedness or supposed indebtedness of her husband's estate to the Bank of the United States, as evinced by the bond and mortgages referred to in complainants' bill, and which indebtedness was relinquished and released by said Cowperthwaite, Dunlap, and Cope, in consequence of the execution of said deed by respondent; said complainants paid her no new consideration, nor was any money advanced or paid to her; in fact, said arrangement was understood to be a compromise of the matters of difference between said Bank of the United States and her husband's estate. Whether this respondent had power to make such arrangements, and thereby bind the estate of her said husband, she does not know; she believed she had when she made said arrangement, or she would not have made it; this question, however, she submits to the decision of this honorable court; the above conveyance was made by her in her character of trustee; she assumed to convey such rights only as she as trustee and executrix under said will could legally do; it was not intended by her as a conveyance of any individual right or interest, but was intended solely to be made by her in her representative character. This respondent further answering states, that she did renounce in writing, in the county court of Mobile, within the time prescribed by law, all individual interest which she had to any or all of the devise or bequest in said will mentioned, and thereby elected to

take any individual interest she as a widow might be entitled to in her husband's estate by operation of law; this respondent further answers and states, that she executed the agreement and deed aforesaid as trustee; she had no interview with Cowperthwaite, Dunlap, or Cope; she signed the deed to them at the request of her friends and adviser, she supposed that she had the power to make the conveyance, and give possession; she does not know of her own knowledge of any agreement between her agent and said complainants above named, that a friendly bill should be filed, except what she learned from others. She believes it was the expectation and intention of all parties at the time of her executing this deed that a bill should be filed, and a decree obtained without objection or resistance, confirming said agreement which she had made, and thereby confirming to complainants the right to said property. But, at the same time, this respondent made known distinctly her intention not to qualify as executrix under the will, and that she would resign the business into other hands, and in fact offered at that time to resign in favor of such person as said complainant might select, so desirous was she of meeting all the first requirements of said complainants, and of avoiding responsibility by any further action in the matter.

Respondent admits that the complainants, Cowperthwaite, Dunlap, and Cope, did, in the lifetime of her husband, file a bill to foreclose the bond and mortgage aforesaid, which was, however, resisted by her husband, who filed thereto the answer hereinbefore referred to, and made a part of this answer, but before said cause was finally disposed of her husband died; she further admits that she was informed and believes the fact to be, that during her husband's lifetime there were various attempts made between the said complainants, Cowperthwaite, Dunlap, and Cope, and her late husband, to compromise and settle their dispute, but they all failed.

Respondent also admits that the greater portion of the property mentioned in said mortgage is improved, and can be rented out; the value of the rents, however, she cannot state; she also admits, that complainant, Cope, came to Mobile as agent of the Bank of the United States, and to attend to, as she was informed, its affairs in Mobile; it was during this visit that she executed the deed and made the arrangement before referred to, believing, as before stated, that she had power to do so.

Respondent, further answering to so much of the bill of complainants as is styled the second amended and supplemental bill of Joseph Cowperthwaite, Thomas Dunlap, Herman Cope, James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert D. Pitfield, Robert Howell, and the president, directors, and company of the Bank of the United States, was *is* not herein before answered, states that the filing of the first amended and supplemental bill, so called by complainants, she presumes is shown by the record in this cause, to which she refers for greater accuracy, as well as to the order and proceedings thereupon

had; she further states that she knows nothing of the repeated negotiations by Isaac H. Erwin, the administrator, &c., of the arrangement and deed made as herein before stated by this respondent to complainants Cowperthwaite, Dunlap, and Cope; nor does she know what interviews, or correspondence, or attempted compromises took place between the said Isaac H. Erwin and the agent of complainants; she refers for an accurate statement of all these matters to the answer of her co-defendant, Isaac H. Erwin, who, she presumes, will state every thing material in relation thereto; in relation to the $150,000 paid by complainants to James Erwin at the time respondent made the deed as aforesaid, she does not know what understandings or agreements existed between said complainants, further than she has been informed of the same by the said James Erwin; no part of said $150,000 ever came to her hand to appropriate, either to her own use or in payment of the creditors of her husband's estate; she has understood from said James Erwin that said sum of $150,000 was paid by said complainants to him in consideration that he would convey and relinquish to complainants his right to eight valuable storehouses in Mobile, valued in the mortgage at $200,000, and which he had purchased at execution sale under a judgment of prior date to complainants' mortgage; what agreement, if any, existed between said complainants and said James Erwin, in regard to appropriation of this money, she knows not; she never however understood from any of the parties that said money was paid to said Erwin to pay debts due by the estate of said Henry Hitchcock, except at his own pleasure, as he always claimed entire ownership of that amount as received for his sale to the Bank of the United States of eight houses and lots; this respondent further answering states that she knows nothing of the inducements which led to the advance of any moneys by the complainants to said Henry Hitchcock, other than what appears on the face of the agreement, bond, and mortgage, referred to in the answer of her husband; she admits that said Henry Hitchcock in his lifetime refused to put complainants in possession of the rents of said property, and resisted the enforcement of said demand; this respondent does not know that the said sum of one hundred thousand dollars was [expended in improvements on the mortgaged premises; she believes that when said sum of one hundred thousand dollars] was advanced; that said Henry Hitchcock's affairs had become somewhat embarrassed; she has been informed, and believes, that a portion of said sum was applied to the payment of debts of a pressing and confidential nature; he made improvements, it is true, after the reception of said sum, but said improvements were not confined to the mortgaged premises, but made valuable improvements on other parts of his estate, and employed funds therein, arising as she believes from other sources; and also created debts to make said improvements, many of which she believes are yet unpaid; she admits that she has been informed and believes that the Bank of the United States has made an assignment or deed of convey-

ance to complainants, Dundas, Lewis, Jones, Pittfield, and Howell. She has not seen said assignment, and does not know its contents; she presumes, however, that the said complainants have the custody and control of said deed, and will exhibit it to the court on the final hearing of this cause.

This respondent, having fully answered, prays to be hence dismissed with her reasonable costs in this behalf most wrongfully sustained.

ANNE HITCHCOCK.

Anne Hitchcock being duly sworn saith, that all she has stated in the foregoing answer as of her own knowledge, she knows true, and what she has derived from the information of others she believes to be true.

Sworn and subscribed before me, this 15th April, 1842.

A. P. JACKSON, *Judge.*

STEWART & EASTON,

Solicitors for Anne Hitchcock, defendant.

Filed 23d June, 1842.

M. J. McRAE, *Register.*

At a term of the court of chancery for the first district of the southern chancery division of the State of Alabama, at Mobile, began and held on the first Monday of April, A. D. 1845, his honor, Anderson Crenshaw, chancellor, presiding, on the 18th day of April, A. D. 1845, the same being a day of said term, the following order was made in this cause, to wit:

COWPERTHWAITE, DUNLAP, AND COPE, compl'ts,
vs.
ISAAC H. ERWIN, administrator et al., deft's.

In this case the certificate of the affirmance of the decree of this court by the Supreme Court being on file, and the complainants having elected to take a decree of absolute foreclosure, it is ordered that a copy of the decree be served upon the receiver and all parties in possession of the mortgaged premises holding subject to the mortgage; and that in case the receiver or any party holding subject to the mortgage and decree shall refuse to deliver possession to the complainants, that then a writ of possession issue, commanding the sheriff to put the complainants into possession of the mortgaged premises, or any part or parcel thereof.

Final decree.

The result is, and [the court] so declares, that the bond and mortgage described and set forth in the bill were lawful and valid in their creation, and ought to be enforced; that the compromise and deed of convey-

ance made by Anne Hitchcock after the death of Henry Hitchcock, are binding and conclusive on the defendants, and that in virtue thereof all the estate of the said mortgaged premises is vested in the complainants, and that the complainants are entitled to a strict foreclosure, and to be quieted in the possession thereof, or that they are entitled to a decree of foreclosure and sale at their election; that the rents and profits of the mortgaged premises in the hands of the receiver ought to be applied towards the extinguishment of their debt, and that the costs of this suit ought to be paid out of the same fund; and it is adjudged and decreed that the receiver deliver possession of the said mortgaged premises to the complainants, and that the injunction heretofore granted be perpetuated; that it is referred to the register and master of this court to take an account and see what amount is due to the complainants for their debt and interest on their said bond and mortgage; and that he take an account of the moneys in the hands of the receiver by him collected or received for rents of said mortgaged premises, and an account of rents in arrear and unpaid, as well as of those not yet due; in taking the account of the receiver, he will make all such allowance for charges and expenses incurred, and for compensation for services as may be just and reasonable, and that whatever balance may be found in the hands of the receiver be paid over to complainants, after deducting therefrom a sufficient sum to pay the costs of this suit. And it is further adjudged and decreed, that the receiver deliver over to the complainants all documents and evidences of rent not yet collected or received, and all contracts in relation to the said premises which may be in his possession or power to produce; and in the event the complainants elect a foreclosure and sale in preference to a strict foreclosure, it is further ordered that the master inquire and ascertain how much and what part of the mortgaged premises ought to be sold to satisfy the complainants' debt and interest, and whether it would be most beneficial to the parties concerned to sell the property in separate lots or parcels; and whether the sale should be for cash or on a credit, and what credit. All of which the register and master will report at the next term of this court, subject to further order and direction.

At chambers, in vacation, 1st July, 1843.

A. CRENSHAW,
Chancellor of the southern chancery division.

Certificate of affirmance.

To the register of the Mobile chancery, greeting:

Whereas the record and proceedings of said court, in a certain cause in which Cowperthwaite et al. *was* plaintiffs, and Isaac H. Erwin, administrator et als. were defendants, it was by said court, at April term, 1843, decreed, "that a certain bond and mortgage, described and set forth in the bill, were lawful and valid in their creation, and ought to be enforced; that the compromise and deed of conveyance made by

Anne Hitchcock, after the death of Henry Hitchcock, are binding and conclusive upon the defendants; and that in virtue thereof all the estate in the said mortgaged premises is vested in the complainants, and that they are entitled to a strict foreclosure, and to be quieted in the possession thereof, or that they are entitled to a decree of foreclosure [and] sale at their election; that the rents and profits of the mortgaged premises in the hands of the receiver ought to be applied towards the extinguishment of their debt; that the costs of this suit ought to be paid out of the same fund; that the register deliver possession of the said mortgaged premises to the complainants, and that the injunction, heretofore granted, be perpetuated; that it be referred to the register and master of this court to take an account, and see what amount is due to the complainants for their debt and interest on their said bond and mortgage, and that he take an account of the moneys, in the hands of the receiver, by him collected or received for rents of said mortgaged premises, &c., &c., &c., were brought before our supreme court by writ of error, issued by the register of said court, on the twenty-sixth day of August, 1843, on behalf of said Isaac H. Erwin, administrator et al., plaintiffs in error.

Now, it is hereby certified, that it was thereupon, by our supreme court, on the 15th day of January, 1845, ordered, adjudged, and decreed, that the decree of said chancery court be affirmed; and it is further ordered, adjudged, and decreed, that the costs of this court be paid out of the rents and profits of the mortgaged premises in the hands of the receiver, appointed by said chancery court.

Witness James B. Wallace, clerk of said supreme court, the 14th day of April, 1845.

JAMES B. WALLACE, *Clerk.*

THE STATE OF ALABAMA, *Mobile county.*

I, Malcolm J. McRea, register of the court of chancery for the first district of the southern chancery division of said State, at Mobile, do hereby certify, that the foregoing sixty-five pages and eight lines contain true copies of the original amended and supplemental bills, answer of Anne Hitchcock, the final decree, the certificate of affirmance, and decree to elect in the cause heretofore pending in said court, wherein Cowperthwaite, Dunlap, and Cope were complainants, and Isaac H. Erwin, administrator of Henry Hitchcock, deceased, et al., were defendants, as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court of chancery, this third day of January, in the year of our Lord eighteen hundred and forty-eight, and of the American independence the 71st year.

Attest: M. J. McRAE, *Reg'r.*

Replication of Anne Hitchcock.

In chancery. Before the circuit court of the United States, for the southern district of Alabama, between Ann Hitchcock, plaintiff, and James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, defendants.

The replication of Anne Hitchcock to the answer of James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, defendants to the bill of complaint of said Anne Hitchcock.

This repliant, saving and reserving to herself all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says, that she will aver and prove her said bill to be true, certain, and sufficient to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by her said bill she has already prayed.

STEWART & EASTON &
A. F. HOPKINS,
Solicitors for complainant.

Mortgage deed of H. Hitchcock.

Know all men by these presents, that I, Henry Hitchcock, of the city and county of Mobile, in the State of Alabama, in consideration of the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, to me in hand paid by Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, in the State of Pensylvania, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, convey, and confirm, unto the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, and to the survivors and survivor of them, and the heirs, executors, administrators, or assigns of such survivor forever, all those pieces and parcels of ground lying and being in the city of Mobile, and which are described as follows, to wit: Three lots with three four-story brick stores, with granite fronts, thereon, beginning at a point on the south side of St. Francis street ninety feet west of Commerce street, thence running west on said street sixty-three feet to the premises of Robertson, Beal & Co., having a depth of seventy-six feet, valued at seventy-five thousand dollars; also a house and lot on the north side of St. Louis street, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street, thence running west on St. Louis street sixty-eight feet, having a depth of one hun-

dred and ten feet, valued at fifteen thousand dollars; also a house and lot at the northwest corner of Church and St. Joachim streets, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on St. Joachim street, valued at twelve thousand dollars; also a house and lot situate on the south side of Government street, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house, valued at twenty-five thousand dollars; also a vacant lot on the south side of Government street, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet, valued at twelve thousand dollars; also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet, valued at five thousand dollars; also four vacant lots on the north side of Government street, between Hamilton and Franklin streets, having a front of fifty feet on Government street, equal to two hundred and twenty feet, by a depth of one hundred and two feet, valued at thirty-three thousand dollars; also a vacant lot in the rear of the above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet, valued at six thousand dollars; also three lots, including a three-story brick dwelling and out-houses, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet, valued at fifty-five thousand dollars; also fifty-four acres of ground on the west side of Mobile bay, called and known as "Frescati," bounded on the east by said bay, on the south by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon, valued at fifty thousand dollars; also two three-story brick dwellings, with stores underneath, on the north side of Government street, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel, valued at forty thousand dollars. Also eight four-story brick dwellings, with stores underneath, on the south side of Government street, commencing fifty-two feet from the southeast corner of Government street and Royal street, having a front of twenty-six feet each, extending east, towards Water street, two hundred and eight feet, by a depth of one hundred feet, valued at two hundred thousand dollars. Also nine lots twenty-four feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine, valued at one hundred and eleven thousand dollars.

Also ten lots of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick, valued at seventy-three thousand two hundred dollars. Also ten vacant lots, each twenty-eight feet front, on the north side of St. Francis street, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet, valued at fifty thousand dollars. Also a lot fronting thirty-four feet on Joachim street, by a depth of one hundred and sixty feet, in the rear of the above, valued at six thousand dollars. Also a lot fronting thirty feet on St. Joachim, in the rear of No. 16, and one hundred and twenty feet deep, valued at five thousand dollars. Also an entire square, bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets, valued at one hundred and sixty-three thousand dollars. Also a water lot in front of the above, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon three hundred and twenty feet by ninety feet, valued as part of the above premises. Also a house and lot at the northwest corner of St. Emanuel and Eslava streets, fronting sixty-six feet on St. Emanuel street, by a depth of one hundred and thirty feet, valued at twenty-five thousand dollars. Also a house and lot at the northwest corner of St. Louis and Jackson streets, eighty-five feet front on St. Louis street, by a depth of one hundred and twenty-feet, valued at twenty-five thousand dollars. Together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances unto the above mentioned and described premises belonging or in anywise appertaining. To have and to hold the above described premises, with the appurtenances, unto the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and to the heirs, executors, and assigns of such survivor forever. Provided always, and these presents are upon the express condition, that if the said Henry Hitchcock shall well and truly pay to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, or to their executors or assigns of such survivor, the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with eight per cent. interest per annum, from the first day of March, A. D. one thousand eight hundred and thirty-eight, thereon accruing, payable semi-annually, according to the condition of a certain bond by the said Henry Hitchcock given, payable to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, bearing even date with these presents, shall cease, determine, and be void, otherwise to be and remain in full force and virtue.

Given under my hand and seal this fourteenth day of July in the year of our Lord one thousand eight hundred and thirty-eight.

H. HITCHCOCK, [SEAL.]
ANNE HITCHCOCK. [SEAL.]

Signed, sealed, and delivered in the presence of—

And I, Anne Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar, to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish, by these presents, all my right and title of dower in and to the above described premises, to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, and to the heirs, executors, and assigns of such survivor forever.

Witness my hand and seal this fourteenth day of July, A. D. one thousand eight hundred and thirty-eight.

ANNE HITCHCOCK, [SEAL.]

Attest: CHARLES A. MARSTON.

THE STATE OF ALABAMA,
Mobile county.

Personally appeared before me, Charles A. Marston, notary public in and for said county, the above named H. Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned; and also appeared personally before me, Charles A. Marston, Anne Hitchcock, wife of the said H. Hitchcock, who being examined privately and apart from her said husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely and of her own accord, and without any fear, threats, or compulsion of her said husband.

Given under my hand and seal notarial, this fourteenth day of July, A. D. 1838.

[L. S.] CHARLES A. MARSTON.

Received in office for record, July 16th, 1838.

WM. TAYLOR, *Clerk.*

Recorded in book V, pages 569, 570, 571, and 572.

WM. TAYLOR, *Clerk.*

Bond of H. Hitchcock to Cowperthwaite, Dunlap, and Cope.

Know all men by these presents, that I, Henry Hitchcock, of the county and city of Mobile, in the State of Alabama, am held and firmly bound unto Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, in the State of Pennsylvania, in the penal sum of twelve hundred and forty-one thousand sixty-one dollars and ninety-two cents, lawful money of the United States; for payment of which sum, well and truly to be made to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, to the survivors and survivor of them, and the heirs, executors, and assigns of

such survivor, I do bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with my seal, and dated this fourteenth day of July, A. D. one thousand eight hundred and thirty-eight.

The condition of this obligation is such, that whereas the said Henry Hitchcock is justly indebted to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope in the full and just sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with interest thereon, from the first day of March, A. D. one thousand eight hundred and thirty-eight, at the rate of eight per centum per annum, said interest payable semi-annually on the first days of September and the first days of March, each and every year, until the entire principal shall be paid; and the said principal of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents to be payable in four annual instalments, as follows, to wit: On the first day of March, A. D. one thousand eight hundred and thirty-nine, two-fifths of the said principal. And on the first day of March, A. D. one thousand eight hundred and forty, one-fifth thereof; and on the first day of March, A. D. one thousand eight hundred and forty-one, one other fifth thereof; and on the first day of March, A. D. one thousand eight hundred and forty-two, the other and remaining fifth of said principal. The payments of the said interest semi-annually as aforesaid, and of the said instalments as aforesaid, to be made in the city of New York, at the times and in the manner above specified. Now, if the said Henry Hitchcock, his executors and administrators, shall well and truly pay and satisfy the said several sums of interest, as well as principal, in the manner above prescribed, as they shall fall due, then this obligation to be null and void, otherwise to remain in full force and virtue. And it is hereby stipulated and agreed, by and between the said Henry Hitchcock and the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, that if default be made by the said Henry Hitchcock, his executors or administrators, in the payment of either principal or interest, at the stipulated times herein before mentioned, then the whole debt shall become due and payable; and the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and the heirs, executors, and assigns of such survivor, may proceed to collect the same immediately.

H. HITCHCOCK. [SEAL.]

Signed, sealed, and delivered, in presence of—
CHARLES A. MARSTON.

STATE OF ALABAMA, *Mobile county.*

Personally appeared before me, Charles A. Marston, a notary public in and for said county, the above named H. Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing instrument of writing to Joseph Cowperthwaite, Thomas Dunlap, and Her-

man Cope, on the day and year therein mentioned, and for the uses and purposes therein contained.

Given under my hand and seal notarial, this fourteenth day of July, A. D. 1838.

[L. S.] CHARLES A. MARSTON,
Notary public.

Mortgage of Mansony to Anne Hitchcock.

Know all men by these presents, that whereas by an agreement in writing, dated Mobile, 10th of October, 1838, executed by Charles J. Mansony and Firman Hurtel of the one part, and Henry Hitchcock in his lifetime, of the other part, all of the city of Mobile, the said Hitchcock agreed to lease and demise to the said Mansony and Hurtel, and the said Mansony and Hurtel agreed to hire and rent of the said Hitchcock, for the term of five years from and after the first day of November then next ensuing, (1838,) the new steam cotton press and sheds, and the wharf and water privileges in front of the same, on the square bounded by Water, Maine, Royal, and Massachusetts streets, with all the appurtenances thereunto belonging, being in the lower part of the city of Mobile, and known as Hitchcock's press, at and for a certain yearly rent therein fully specified and set forth. And whereas the said Mansony and Hurtel did, in said written agreement, among other things, agree to secure the payment of the said rent according to the terms of said agreement, by a pledge of real and personal estate, of the value of twenty-five thousand dollars.

Now, therefore, in consideration of the premises, and in the further consideration of one dollar, to me in hand paid before the ensealing and delivery of these presents, the receipt whereof I do hereby acknowledge, I, the said Charles J. Mansony, do grant, bargain, sell, and convey, unto Anne Hitchcock, executrix of the said Henry Hitchcock, all that certain lot or parcel of land and premises, situate, lying, and being in the city of Mobile, and State of Alabama, on the east side of St. Emanuel street, having a front on said street of fifty-three feet by a depth of one hundred and thirty-one feet, bounded on the west by St. Emanuel street, on the south by an alley, on the north by lands of Hugh Munroe, and on the east by an alley, together with all and singular the tenements, privileges, and appurtenances thereunto belonging, or in any wise appertaining; to have and to hold the afore granted and bargained premises, to her, the said Anne Hitchcock, executrix as aforesaid, her heirs and assigns forever. And I, the said Charles J. Mansony, for myself, my heirs, executors, and administrators, do covenant with the said Anne Hitchcock, executrix, her heirs and assigns, that I am lawfully seized in fee of the afore granted premises, that they are free from all incumbrances, that I have good right to sell and convey the same to the said Anne as aforesaid, and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Anne, her heirs and assigns forever, against the lawful claims

and demands of all persons: Provided, nevertheless, that if the said Charles J. Mansony, his heirs, executors, or administrators, shall pay, or cause to be paid, unto the said Anne Hitchcock, executrix as aforesaid, her executors, administrators, or assigns, the said rent reserved to be paid for the said cotton press, according to the terms and stipulations of the said written agreement above referred to, so that the whole of said rent shall [be] well and truly paid, then this deed and the said written agreement shall both be null and void, otherwise to be and remain in full force and virtue.

In testimony whereof, I, the said Charles J. Mansony, have hereunto set my hand and seal this twenty-second day of August, in the year one thousand eight hundred and thirty-nine.

C. J. MANSONY. [SEAL.]

Signed, sealed, and delivered in presence of—
K. B. SEWALL.

And Merced, wife of the said Charles J. Mansony, in consideration of ten cents to her paid, the receipt whereof she doth hereby acknowledge, doth hereby release to the said Anne Hitchcock, executrix as aforesaid, her heirs and assigns, all her right and title to dower in the afore granted premises.

M. MANSONY. [SEAL.]

Witness my hand and seal, in presence of—
K. B. SEWALL.

STATE OF ALABAMA,
Mobile county.

On the day and year hereinafter named, personally appeared before me, Kiah B. Sewall, a notary public for the county aforesaid, duly commissioned and qualified, the within named Charles J. Mansony and Merced, his wife, who severally acknowledged that they signed, sealed, and delivered the with[in] deed on the day and year therein mentioned, as their free act and deed.

Witness my hand and notarial seal this twenty-third day of August, eighteen hundred and thirty-nine.

[L. S.] KIAH B. SEWALL,
Notary public.

Recesved in office for record, November 9th, 1839.
Recorded in book X, pages 646 and 647.

Assigument of Anne Hitchoock of deed of Mansony.

Whereas, Anne Hitchcock, executrix of the last will and testament of Henry Hitchcock, deceased, is indebted to the West Point Foundry Association, of the State of New York, in the sum of ten thousand eight hundred dollars, in and by a certain promissory note, bearing date the fif-

teenth day of October, A. D. 1839, made and signed by the said Anne Hitchcock, in favor of Isaac H. Erwin, and by him and William J. Ledyard endorsed, payable in the city of New York, on the 25th day of January, A. D. 1840, for the said sum of ten thousand eight hundred dollars, and is desirous of securing the just payment of the said sum of money according to the tenor and effect of the said note.

Now, in consideration of the premises, and for the further consideration of the sum of one dollar, to her in hand paid at and before the sealing and delivery hereof, by Edward C. Center and Henry O. Brewer, she, the said Anne Hitchcock, executrix as aforesaid, hath granted, bargained, sold, assigned, transferred, and set over, and doth by these presents grant, bargain, sell, assign, transfer, and set over, unto the said Edward C. Center and Henry O. Brewer, and the survivor of them, and the executors or administrators of such survivor, the within and foregoing deed of mortgage bearing date the 22d day of August, A. D. 1839, and made by and between Charles J. Mansony and Merced, his wife, and the said Anne Hitchcock, executrix as aforesaid; and all the estate, right, title, interest, property, claim, demand, remedy, legal or equitable, which the said Henry Hitchcock, deceased, had in his lifetime, or which the said Anne Hitchcock, as executrix aforesaid, now has, or may have, of, in, to, or out of the said deed of mortgage, or the estate thereby conveyed. In trust, nevertheless, that the said Edward C. Center and Henry O. Brewer shall have and hold the said mortgage for the security of the payment of the said sums of ten thousand eight hundred dollars, to the said West Point Foundry Association of the State of New York, or their assigns, according to the tenor and effect of the said above described promissory note. And further, that if the said sum of money be well and truly paid as aforesaid, according to the tenor and effect of the said promissory note, that then and in that case the said Edward C. Center and Henry O. Brewer, the survivor of them, and the executors or administrators of such survivor, shall and will forthwith re-convey and re-assign the said deed of mortgage to the said Anne Hitchcock, executrix as aforesaid.

In witness whereof the parties hereunto set their hands and seals, this fifteenth day of October, A. D. 1839.

ANNE HITCHCOCK. [L. S.]

Signed, sealed, and delivered in presence of us—
WM. J. LEDYARD,
L. E. LEDYARD.

THE STATE OF ALABAMA,
Mobile county, ss.

Personally appeared before me, William Brooks, a notary public in and for the said county, duly commissioned and sworn, Wm. J. Ledyard, one of the subscribing witness to the foregoing assignment of mortgage, who being first duly sworn, deposeth and saith, that he saw Anne Hitchcock, whose name is subscribed thereto, sign and deliver the same to Edward C. Center and Henry O. Brewer; that he, this

deponent, subscribed his name as a witness thereto, in the presence of the said Anne Hitchcock, and that he saw the other subscribing witness, L. E. Ledyard, sign the same in the presence of the said Anne Hitchcock, and in the presence of each other, on the day and year therein named.

Given under my hand and seal of office, this ninth day of November, A. D. 1839.

[L. S.] WILLIAM BROOKS,
Notary public.

For value received, we, Edward C. Center, by his attorney in fact Henry O. Brewer, and Henry O. Brewer for himself, do hereby assign, transfer, and set over, to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and the executors, administrators, and assigns of such survivor forever, all our right, title, interest, estate, and remedies, legal and equitable, in, to, or out of the annexed and foregoing mortgage, executed on the 22d day of August, A. D. 1839, by and between C. J. Mansony and Anne Hitchcock, executrix, being for a lot of ground as therein described, situate in the city of Mobile, having a front on the east side of St. Emanuel street of fifty-three feet, by a depth of one hundred and thirty-one feet. And also all our right, title, interest, estate, and remedies, legal and equitable, in, to, or out of the annexed agreement made by Anne Hitchcock on the fifteenth day of October, A. D. 1839, conveying to us all right, title, &c., to the aforesaid mortgage held by her or her husband, the late Henry Hitchcock, in said mortgage.

In testimony whereof we have hereunto set our hands and seals, this seventeenth day of July, A. D. 1841.

EDWARD C. CENTER, [SEAL.]
By H. O. BREWER,
H. O. BREWER. [SEAL.]

Signed, sealed, &c., in presence of—
HINDMAN BARNEY.

Mortgage of F. Hurtel to Ann Hitchcock.

Know all men by these presents, that whereas, by an agreement in writing, dated Mobile, 10th October, 1838, executed by Charles J. Mansony and Firman Hurtel, of the one part, and Henry Hitchcock, in his lifetime, of the other part, all of the city of Mobile, the said Hitchcock agreed to demise and let to the said Mansony and Hurtel, and the said Mansony and Hurtel agreed to hire and rent of the said Hitchcock, for the term of five years from and after the first day of November then next ensuing, (1838,) "the new steam cotton press and sheds, and the wharf and water privileges in front of the same, on the square bounded by Water, Maine, Royal, and Massachusetts streets, with all the appurtenances thereunto belonging, being in the lower part of the city of Mobile, and known as

Hitchcock's press, at and for a certain yearly rent therein fully specified and set forth. And whereas the said Mansony and Hurtel did, among other things in said written agreement, agree to secure the payment of the said rent, according to the terms of said agreement, by a pledge of real and personal estate of the value of twenty-five thousand dollars: Now, therefore, know ye, that I, Firman Hurtel, in consideration of the premises, and in the further consideration of one dollar, to me in hand paid, before the ensealing and delivery of these presents, by Anne Hitchcock, executrix of Henry Hitchcock aforesaid, the receipt whereof I do hereby acknowledge, do hereby grant, bargain, sell, and convey, unto the said Anne Hitchcock, executrix, all that lot or parcel of land and premises situate, lying, and being in the city of Mobile and State of Alabama, bounded on the north by Eslava street, on which it fronts sixty-five feet eight inches; on the west by Claiborne street, on which it fronts one hundred and ten feet, and having the same number of feet in the rear of said street as on the front thereof; together with all and singular the tenements, privileges, and appurtetenances thereunto belonging or in anywise appertaining. To have and to hold the aforegranted and bargained premises to her, the said Anne Hitchcock, executrix as aforesaid, her heirs and assigns forever.

And for the considerations aforesaid, I, the said Hurtel, do hereby bargain, sell, and convey, unto the said Anne Hitchcock, executrix as aforesaid, the following named slaves, male and female, to wit, Sam, John, Isaac, Stokes, Abraham, Sandy, and Polly, Adam, Ben, Jacque, Wilson, Isam, Jane, and Mary Ann, with the further increase of said female slaves. To have and to hold the said slaves to her, the said Anne Hitchcock, executrix as aforesaid, to her and her heirs and assigns forever.

And I, the said Hurtel, for myself, my heirs, executors, and administrators, do covenant with the said executrix, her heirs, and assigns, that I am lawfully seized in fee of the aforegranted and bargained premises; that they, as well as the said negro slaves, are free from all incumbrances; that I have good right to sell and convey the same, together with the said slaves, to the said Anne as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Anne, executrix as aforesaid, her heirs and assigns forever, against the lawful claims and demands of all persons: Provided, nevertheless, that if the said Firman Hurtel, his heirs, executors, or administrators, shall pay or cause to be paid unto the said Anne Hitchcock, executrix as aforesaid, her executors, administrators, or assigns, the said rent reserved to be paid for the said cotton press, according to the terms and stipulations of the said written agreement above referred to, so that the whole of said rent shall well and truly be paid, then this deed and the said written agreement shall be both null and void; otherwise to be and remain in full force and virtue.

And Severine, wife of the said Firman Hurtel, in consideration of ten cents to her in hand paid, the receipt whereof she doth hereby acknowledge, doth hereby release to the said Anne Hitchcock, executrix

as aforesaid, her heirs and assigns, all her right and title to dower in the aforesaid premises.

In testimony whereof I, the said Firman Hurtel and Severine, my wife, have hereunto set our hands and seals, this twenty-second day of August, eighteen hundred and thirty-nine.

F. HURTEL, [SEAL.]
SEVERINE HURTEL. [SEAL.]

Signed, sealed, and delivered, in presence of—
K. B. SEWALL.

STATE OF ALABAMA,
Mobile county, ss.

Be it remembered, that on this twenty-third day of August, 1839, personally appeared before me, Kiah B. Sewall, a notary public for the county of Mobile aforesaid, duly commissioned and qualified, the above named Firman Hurtel and Severine, his wife, who severally acknowledged that they signed, sealed, and delivered the foregoing deed, on the day and year therein mentioned, as their free act and deed.

Witness my hand and notarial seal, the day and year last aforesaid.

[L. S.] KIAH B. SEWALL, *Not. Pub.*

Assignment of A. Hitchcock.

Whereas Anne Hitchcock, executrix of the last will and testament of Henry Hitchcock, deceased, is indebted to the West Point Foundry Association of New York in the sum of ten thousand eight hundred dollars, in and by a certain promissory note bearing date the fifteenth day of October, A. D. 1839, made and signed by the said Anne Hitchcock in favor of Isaac H. Erwin, and by him and William J. Ledyard endorsed, payable in the city of New York on the 25th day of January, A. D. 1840, for the said sum of ten thousand eight hundred dollars, and is desirous of securing the just payment of the said sum of money according to the tenor and effect of the said note.

Now, in consideration of the premises, and for the further consideration of one dollar, to her in hand paid at and before the sealing and delivery hereof, by Edward C. Center and Henry O. Brewer, she, the said Anne Hitchcock, executrix as aforesaid, hath granted, bargained, sold, assigned, transferred, and set over, and doth by these presents grant, bargain, sell, assign, transfer, and set over, unto the said Edward C. Centre and Henry O. Brewer, and the survivor of them, and the executors or administrators of such survivor, the within annexed and foregoing deed of mortgage, bearing date the 22d day of August, A. D. 1839, and made by and between Firman Hurtel and Severine, his wife, and the said Anne Hitchcock, executrix as aforesaid; and all the estate, right, title, interest, property, claim, demand, and remedy, legal or equitable, which the said Henry Hitchcock, deceased, had in his lifetime, or which the said Anne Hitchcock, as executrix as aforesaid, now has or may have, of, in, to, or out of the said deed of mortgage or the estate

thereby conveyed; in trust, nevertheless, that the said Edward C. Center and Henry O. Brewer shall have and hold the said mortgage for the security of the said sum of ten thousand eight hundred dollars to the said West Point Foundry Association of the State of New York, or their assigns, according to the tenor and effect of the said above described promissory note; and further, that if the said sum of money be well and truly paid as aforesaid, according to the tenor and effect of the said promissory note, that then and in that case the said Edward C. Center and Henry O. Brewer, the survivor of them, and the executors or administrators of such survivor, shall and will forthwith reconvey and reassign the said deed of mortgage to the said Anne Hitchcock, executrix as aforesaid.

In witness whereof the parties hereunto set their hands and seals this fifteenth day of October, A. D. 1839.

ANNE HITCHCOCK. [L. S.]

Signed, sealed, and delivered in presence of—
WM. J. LEDYARD,
L. E. LEDYARD.

THE STATE OF ALABAMA,
Mobile county, ss.

Personally appeared before me, William Brooks, a notary public in and for said county, duly commissioned and sworn, Wm. J. Ledyard, one of the subscribing witnesses to the aforegoing assignment of mortgage, who first being duly sworn deposeth and saith, that he saw Anne Hitchcock, whose name is subscribed thereto, sign and deliver the same to Edward C. Center and Henry O. Brewer; that he, this deponent, subscribed his name as a witness thereto in the presence of the said Anne Hitchcock, and that he saw the other subscribing witness, L. E. Ledyard, subscribe the same in the presence of the said Anne Hitchcock, and in the presence of each other, on the day and year therein named.

Given under my hand and seal of office this ninth day of November, A. D. 1839.

[L. S.] WILLIAM BROOKS,
Notary Public.

For value received, we, Edward C. Center, by his attorney in fact Henry O. Brewer, and Henry O. Brewer for himself, do hereby assign, transfer, and set over, to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and the executors, administrators, and assigns of such survivor forever, all our right, title, interest, estate, and remedies, legal and equitable, in, to, or out of the annexed and foregoing mortgage, executed on the 22d day of August, A. D. 1839, between Firman Hurtel and Severine, his wife, on the one part, and Anna Hitchcock, executrix, on the other, being for a lot of ground therein described, bounded on the north by Eslava street, on which it fronts sixty-five feet eight inches, and on the west by

Claiborne street, on which it fronts one hundred and ten feet; and also for sundry male and female slaves therein named, as follows: Sam, John, Isaac, Stoke, Abraham, Sandy, Polly, Ben, Jacques, Wilson, Isam, Jane, and Mary Ann. And also our right, title, estate, remedies, legal and equitable, in, to, or out of the annexed agreement, made by Anna Hitchcock on the fifteenth day of October, A. D. 1839, conveying to us all right, title, &c., to the aforesaid mortgage held by her or her husband, the late Henry Hitchcock, in said mortgage.

In testimony whereof we have hereunto set our hands and seals this 17th day of July, A. D. 1841.

EDW'D. CENTER, [SEAL.]
By H. O. BREWER,
H. O. BREWER. [SEAL.]

Signed, sealed, &c., in presence of—
HINDMAN BARNEY.

Conveyance from Cowperthwaite et als. to Dundas et als.

This indenture, made the eighth day of September, in the year of our Lord one thousand eight hundred and forty-one, between Joseph Cowperthwaite and Rebecca, his wife, Thomas Dunlap and Anna W., his wife, Herman Cope and Mary, his wife, all of the city of Philadelphia, State of Pennsylvania, of the first part, and James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, of the same city and State, of the second part, witnesseth: That the said parties of the first part, for and in consideration of one dollar, to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors and administrators forever released and discharged from the same by these presents, have bargained, granted, sold, remised, released, enfeoffed, conveyed, and confirmed, and by these presents do grant, bargain, sell, remise, release, enfeoff, alien, convey, and confirm, unto the said parties of the second part, the survivor or survivors of them, and the heirs, executors, administrators, and assigns of such survivor forever, all those several pieces, parcels, and lots of land and premises, situate, lying, and being in Mobile county, State of Alabama, described and designated as follows, to wit: Three lots of land, being part of section number fourteen, in township number four, and range number two, west of the lands subject to sale at the United States land office at St. Stephen's, Alabama, and being lots numbered one, five, and eight, according to a plat or plan thereof, made by James Dowel, surveyor, for Joshua and Christopher Collins, on the fourteenth day of June, 1839, and recorded in the office of the clerk of the county court of Mobile county, book Z, page 209, as by reference to the same will more fully appear; each of the said lots containing ten acres.

Also those certain tracts or parcels of land being in township num-

ber four south, of the thirty-first degree of latitude, and range two west, known and described as follows, to wit: The northeast quarter and southwest quarter of section number twenty-four, containing three hundred and eighteen $\frac{75}{100}$ acres.

The east half of the southeast quarter of section number twenty-three, containing eighty $\frac{10}{100}$ acres. The southwest quarter of section [number twenty-three,] containing one hundred and sixty $\frac{30}{100}$ acres. The southeast quarter of section number twenty-two, containing one hundred and sixty $\frac{30}{100}$ acres. The whole of the above described tracts being land subject to sale at the district of St. Stephen's, in the State of Alabama, and containing in all seven hundred and nineteen $\frac{35}{100}$ acres. Also the west half of the southwest quarter of section number three, in township number five, of range two west, containing eighty acres. Also the following pieces, parcels, and lots of land, lying and being in township two south, and range number one east, of lands subject to sale at St. Stephen's, in the State of Alabama, and described as follows, viz: The southeast quarter and the east half of the southwest quarter of section number five, containing two hundred and forty acres. The southwest quarter of section number four, containing one hundred and sixty acres. The east and west subdivisions of southeast fractional quarter of section number four, containing one hundred and forty-eight $\frac{48}{100}$ acres. And the southwest fractional subdivision quarter of [section] number three, containing thirty-six $\frac{31}{100}$ acres. Also those certain pieces or parcels of land described as follows, viz: The southwest quarter and the west half of the southeast quarter of section nomber thirty-one, in township number two south, and range number one east, containing two hundred and forty acres. The east half of the southeast quarter of section thirty-six, in township number two south, and range number one west, containing seventy-nine $\frac{31}{100}$ acres. Also divisions C and D, and the northwest quarter of fractional section number twenty one, containing one hundred and eighty acres; and west fractional section number twenty-two, containing eighty-eight $\frac{50}{100}$ acres, all in township two south, and range one east, and being lands subject to sale at Saint Stephen's, in the State of Alabama; the said above described lands having been conveyed by A. H. Gazzam and wife to George Wragg, by indenture recorded in the office of the clerk of the county court of Mobile county, in book W, pages 351, 352, 353, 354. Also the undivided one-half of the undivided one-fourth part of so much of all that piece, parcel, or tract of land situate, lying, and being within the corporate limits of the city of Mobile, and known and distinguished therein by the name of the Requte Bermody tract of land, as was set apart and conveyed to George Poe, jr., by a certain indenture of partition, made and executed on the twenty-fifth day of May, one thousand eight hundred and thirty-two, by and between William H. Robertson and Jane S., his wife, Philip McLoskey and George Poe, jr., reference being had to the original indenture between the parties aforesaid, which is duly recorded in the office of the clerk of the county court of Mobile county, in book K, pages 301 and 302, as

by reference to the same will more fully appear. The said piece and parcel of land and premises hereby conveyed being the undivided one-half of the undivided fourth part as aforesaid, containing about seventeen and a half acres, and being the undivided half of the interest which Audley H. Gazzam had in the said tract of land above described, after deducting from the quantity set apart to the said George Poe, junior, by the said deed of partition, about six acres, heretofore conveyed by the said George Poe, junior, to Mrs. Sarah Barnes; and also about eight acres of land, heretofore conveyed by deed of quit claim by said George Poe, junior, to William D. Gayer, and being the same premises which Audley H. Gazzam and wife conveyed to George Wragg by deed recorded in the office of the clerk of the county court of Mobile county, in book S, pages 128 and 129. And also the following described piece or parcel of land and premises, situate within the district of lands subject to sale at the United States land office, at St. Stephen's, in Alabama, that is to say, the northeast quarter of section fifteen, in township four, in range two west, containing one hundred and fifty-nine $\frac{50}{100}$ acres, and being the same premises which Audley H. Gazzam and wife, (intentem) conveyed to George Wragg by deed recorded in the office of the clerk of the county court of Mobile county, in book S, pages 175, 176. Also the following described pieces or parcels of land and premises thereunto attached, situate in the city of Mobile, that is to say, a certain lot of ground fronting on the south side of Church street, in said city, forty-six feet, beginning at a point one hundred and twenty-one feet westward from the southwest corner of Church and Jackson streets, and running thence westward, with line of Church street, forty-six feet to a point; thence southwardly, with the said width of forty-six feet, for a distance of one hundred and forty-two feet in depth. Also two other lots fronting together on the west side of Jackson street, in said city, eighty-six feet six inches, beginning at a point fifty-five feet distant from the northwest corner of *of* Monroe and Joachim streets, and running thence northwardly, with the line of Jackson street, eighty-six feet six inches; thence westwardly, with the said width of eighty-six feet six inches, for a distance in depth of sixty-one feet. Also four other lots, fronting together on the west side of Monroe street, in said city, eighty-four feet six inches, beginning at a point sixty-five feet four inches from the northwest corner of Munroe and Jackson streets, and running thence with the line of Munroe street eighty-four feet six inches; thence northwardly, with the said width of eighty-four feet six inches, for a distance in depth of one hundred and thirty-eight feet; together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances to the said above described premises belonging or in any wise appertaining. Also that certain dwelling-house and lot of land, situate on the north side of Munroe street, and beginning at a point fifty feet distant eastwardly from the northeast corner of said Munroe and Claiborne streets, in said city, and having a front on said Munroe street of about twenty-six feet, and a depth northwardly of about one hundred

and thirty feet, with the same width to a fifteen feet wide alley in the rear of said lot, as at present laid out, running from Jackson street to Claiborne street, about midway between Church and Munroe streets. And also that certain other lot and house thereon erected, situate at the northwest corner of Munroe and Jackson streets, in said city, fronting on the north side of said Munroe street about sixty-four feet, and extending in depth on the western side of Jackson street, with the same width, about sixty-two feet, bounded on the west by premises lately occupied by the Rev. S. S. Lewis, on the north by premises lately occupied by George Wragg. Also the following lot, piece, or parcel of land and premises, situate, lying, and being in the city of Mobile, that is to say, commencing at a post on the south line of the Favre tract, distant nine chains and nine links east from the southwestcorner of said tract, and running thence north 8° west, seven chains sixty seven links; thence 76° 30′ east, eight chains seventy-five links; thence south 8° east, eleven chains ten links, to a post on the south line of said tract; thence north 82° west, along said line, nine chains nine links, to the place of beginning. Also the following described lot of land and premises thereunto attached, said lot situated on the south side of Saint Francis street, in said city, between Lawrence and Cedar streets, beginning at the corner of a brick basement, west of and distant from the corner of Lawrence and Saint Francis streets one hundred and ten feet; running thence westwardly, with the south line of Saint Francis street, forty-one feet; thence southwardly, on a line parallel with Lawrence street, one hundred and ten feet; thence eastwardly, on a line parallel with Saint Francis street, forty-one feet; and thence northwardly, on a line parallel with Lawrence street, one hundred and ten feet, to the place of beginning. Also the following described lot of land and premises thereto attached, said lot situate on the south side of Saint Michael street, in said city, between Cedar and Lawrence streets, having a front on Saint Michael street of forty-six feet, with a depth of ninety-one feet, bounded on the north by Saint Michael street; on the south by a line parallel with Saint Michael street, and distant therefrom seventy-one feet; on the west by a line parallel with Cedar street, and distant therefrom fifty-five feet; and on the east by a line parallel with said western line, and distant therefrom forty-six feet. Also all the undivided one-half of all that certain piece, parcel, or lot of land, with the three two-story brick stores erected thereon, situated in the city of Mobile aforesaid, bounded east by Commerce street, north by St. Michael street, south by Planters' street, and west by an alley, having a front on Commerce street of eighty-four feet; a front on Planters' street of six[ty]-five feet, including half of the alley; and a front on Saint Michael street of sixty-five feet, including half of the alley. And also all the undivided one-half of that certain piece, parcel, or lot of land with the store erected thereon, immediately west of and adjoining the foregoing described lot, having a front on Saint Michael street of thirty-six feet, including half the alley; a front on Planters' street of thirty-six feet, including half the

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alley, and bounded east by the alley and by the three stores before mentioned, north by Saint Michael street, south by Planters' street, and west by a store lately the property of J. Beylle, being the undivided one-half of the premises conveyed to Joseph E. Sheffield and wife to George Starr, and Leaneus and St. John, by deed of the first of April, 1834, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the revision and revisions, remainder and remainders, rents, issues, and profits thereof. Also these three certain lots, situate in the city of Mobile, in square number two hundred and sixty-five, (265,) fronting on St. Joseph street, and having a front of forty feet each, by a depth of one hundred and ten feet, and being lots numbered one, two, and three, of the square above mentioned. Also all and singular the following described lands and premises, that is to say, all those three lots, with three four-story brick stores with granite fronts thereon, beginning at a point on the south side of Saint Francis street, in the city of Mobile, ninety feet west of Commerce street, thence running west on said street sixty-three feet to the premises of Robertson, Beal & Co., having a depth of seventy-six feet. Also a house and lot on the north side of Saint Louis street, in said city, between Jackson and Claiborne streets, commencing eighty-seventy and a half feet west from Jackson street, thence running west on Saint Louis street sixty-eight feet, having a depth of one hundred and ten feet. Also a house and lot at the northwest corner of Church and Saint Joachim streets, in said city, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on Saint Joachim street. Also a house and lot situate on the south side of Government street, [in said city, having a front of one hundred feet *of* Government street,] by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Government and Lawrence streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house. Also a vacant lot on the south side of Government street, in said city, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet. Also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet. Also four vacant lots on the north side of Government street in said city, between Hamilton and Franklin streets, having a front feet on Government of fifty street, equal to two hundred and twenty feet, by a depth of one hundred and two feet. Also a vacant lot in the rear of the above, having a front of sixty-six feet on Hamilton street, by a depth of one hundred and ten feet. Also three lots, including a three-story brick dwelling and out-houses, on the north side of Government street, in said city, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet. Also fifty-four acres of land in Mobile county, situate on the west side of Mobile bay, called and known as "Frescati," bound-

ed on the east by said bay, on the south by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from said Dog river road to the bay, with the buildings and appurtenances thereon. Also two three-story brick dwellings, with stores underneath, on the north side of Government street, in said city, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel. Also eight four-story brick dwellings, with stores underneath, on the south side of Government street, in said city, commencing fifty-two feet from the southeast corner of Government and Royal streets, having a front of twenty-six feet each, extending east towards Water street two hundred and eight feet, by a depth of one hundred feet. Also nine lots, twenty-four feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine. Also ten lots of twenty-four feet six inches each, on the east side of Royal street, between Government and Church streets, in said city, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick. Also ten vacant lots, each twenty-eight feet front on the north side of Saint Francis street, in said city, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet. Also a lot fronting thirty-four feet on Joachim street, in said city, by a depth of one hundred and sixty feet in the rear of the above. Also a lot fronting thirty feet on St. Joachim street, in said city, in the rear of the above mentioned ten lots, between Joachim and Jackson streets, and one hundred and twenty feet deep Also an entire square bounded by Maine, Water, Royal, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Main and Massachusetts streets, in said city, and a water lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon three hundred and twenty feet by ninety feet. Also a house and lot on the northwest corner of Saint Emanuel and Eslava streets, in said city, fronting sixty feet on Saint Emanuel street, by a depth of one hundred and thirty feet. Also a house and lot at the northwest corner of Saint Louis and Jackson streets, in said city, eighty-five feet front on Saint Louis street, by a depth of one hundred and twenty feet; together with all and singular the buildings, improvements, hereditaments, rights, members, and privileges, and appurtenances, to all and singular the above mentioned and described land and premises belonging or in any wise appertaining. Also all and singular that piece, parcel, or tract of land lying and being situate in the county of Mobile aforesaid, commencing at the southwest corner of Joseph W. Moore's land on the road leading from the city of Mobile to Springhill, commonly called the Springhill road, and running with said road to an iron bolt designating the southeast

corner of a lot of land sold by Abner S. Lipscomb to Edward Dunning; thence northwardly, with the line of the said Dunning, fourteen chains forty-three links; thence eastwardly, to the western boundary line of Joseph W. Moore's land; and thence southwardly, on the line of Joseph W. Moore's land, to the place of beginning, containing about six acres and seven tenths of an acre, together with all the rights, members, privileges, and appurtenances, buildings and improvements, belonging or in anywise appertaining to the same.

Also all that certain piece, parcel, or lot of land situate, lying, and being in the city of Mobile aforesaid, beginning at a point on the west side of Commerce street, at the distance of thirty feet and two-thirds of an inch from the south side of Saint Louis street; thence westwardly, ninety feet four inches from the said Commerce street to a point distant southerly thirty feet seven and one-third inches from St Louis street; thence southerly, five feet ten and two-third inches, to a point distant westwardly ninety feet and four inches from Commerce street; thence westwardly, to a point distant southerly thirty-six feet six inches from Saint Louis street; thence southerly, twenty-four feet eight and two-third inches, to a point distant westwardly ninety-three feet four inches from Commerce street; thence eastwardy, to a point on the west side of Commerce street distant southerly thirty feet and two-thirds of an inch from the point of beginning. Said lot bounded east by Commerce street, on which it fronts said thirty feet and two-thirds of an inch; north by William Jones, junior; and on the west and south by land now or late of Rugeby and Harrison, excepting and reserving to William Jones, junior, the right of way and stairway, as is expressed and set forth in a deed granting said right of way and stairway, from William Wallace to the said William Jones, junior, dated the seventh day of March, A. D. 1836. Also all that certain piece, parcel, or lot of land situate, lying, and being in said city, and described as follows, to wit: Bounded on the north by a store and lot now or lately belonging to W. F. Cleveland, on the east by the property of L. H. Huder, on the south by Planters' street, having a front on Water street of twenty-eight feet, and running eastwardly with the same width fifty feet, more or less, to the property of the said L. H. Huder, and being the same premises which L. H. Huder and wife granted and conveyed to James and Charles Gascoigne, by deed dated the eighth day of February, A. D. 1835, recorded in the office of the clerk of the county court of Mobile county, in book N, pages 243, 244. Also all that certain lot or parcel of land lying and being in said city, described as follows, to wit: Bounded on the east by Catharine street; on the west by lands belonging to the legal heirs of George H. Hilliard, late of said county deceased; on the south by the new Springhill road; and on the north by lands of Wm. D. Stone; the said tract, parcel, or lot of land and premises measuring and containing six hundred and twenty-six feet six inches in front on the west side and line of said Catherine street, which is the eastern boundary thereof; also six hundred and thirty feet on the line of its western boundary; the said lands belonging to the said heirs of the said Hilliard, three hundred and forty-

two feet at the south line thereof, which fronts on the north side of the said new Springhill road, and four hundred and fourteen feet on the northern boundary thereof, which is the south line of lands belonging to W. D. Stone. Also all the undivided moiety or half part of that certain piece, parcel, or lot of land and premises attached, situate, lying, and being in said city, and described as follows: Said lot being on the south side of St. Anthony street, containing forty-five feet, more or less, front, by eighty-two feet deep, bounded on the north by Saint Anthony street, on the west by lands belonging to J. B. Toulmin; on the south by lands now or late belonging to Thomas M. English and George S. Gaines, and on the east by lands now or late belonging to John Byrnes and son.

Also all that piece, parcel, or tract of land lying and being in Mobile county aforesaid, with the premises thereunto attached, described as follows: The west half of the northeast quarter of section number twenty-two, township number four south, range number two west, containing eighty $\frac{10}{100}$ acres, and being situated within the district of public lands for sale at Saint Stephen's, Alabama; together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances unto all the above mentioned and described premises belonging or in any wise appertaining. To have and to hold the above granted and described premises with the appurtenances, unto the said parties of the second part, the survivor and survivors of them, and the heirs, executors, administrators, and assigns of such survivor forever.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

J. COWPERTHWAITE, [SEAL.]
REBECCA COWPERTHWAITE, [SEAL.]
T. DUNLAP, [SEAL.]
A. W. DUNLAP, [SEAL.]
HERMAN COPE, [SEAL.]
MARY COPE. [SEAL.]

Signed, sealed, and delivered, in presence of—12 words in the 11th and 12th lines first obliterated.

F. W. HUBBLE,
B. GERHARD.

CITY OF PHILADELPHIA,
State of Pennsylvania, ss.

Be it remembered, that on this eighth day of September, in the year one thousand eight hundred and forty-one, before me, Benjamin Gerhard, commissioner of the State of Alabama, &c., for the State of Pennsylvania, personally appeared Joseph Cowperthwaite and Rebecca, his wife, Thomas Dunlap and Ann W., his wife, Herman Cope and Mary, his wife, parties to the above written deed, and acknowledged that they, and each of them, signed, sealed, and delivered the said deed on the day and year therein mentioned, to the aforesaid James

Dundas, Mordecai D. Lewis, Sam'l W. Jones, Robert L. Pitfield, and Robert Howell. And the said Rebecca, Ann W., and Mary, being each of them of full age, and by me privately examined apart from their said husbands, and the full contents thereof by me made known to them, did each of them declare that they signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband.

Given under my hand and seal, this eighth day of September, one thousand eight hundred and forty-one.

B. GERHARD, [L. S.]
Commissioner.

THE STATE OF ALABAMA,
Mobile county, ss.

I, Drury Thompson, clerk of the county court of Mobile county, do hereby certify that the foregoing is a correct copy of a deed from Joseph Cowperthwaite and wife, Thomas Dunlap and wife, and Herman Cope and wife, to James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, as recorded in my office, in book No. 2, pages 627, 628, 629, 630, 631, 632, and 633.

Given under my hand and seal, this sixteenth day of April, A. D. 1849.

[L. S.]

D. THOMPSON, *Clk.*

Declaration of trust to James Dundas and others.

To all men to whom these presents may come, we, James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, all of the city of Philadelphia, and State of Pennsylvania, send greeting:

Whereas the president, directors, and company of the Bank of the United States did, by a certain indenture, bearing date the first day of May, one thousand eight hundred and forty-one, made between them, the said president, directors, and company of the Bank of the United States, of the one part, and us, the said James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, of the other part, grant, bargain, sell, and convey, inter alia, all their estate, right, title, and interest, in certain messuages, lands, tenements, hereditaments, property, and appurtenances, situate, lying, and being in Mobile county, in the State of Alabama, [the legal title whereof was held by Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, in trust for the said the president, directors, and company of the Bank of the United States] unto us, and the survivor of us, and the heirs and assigns of such survivor, for certain purposes and with certain powers and abilities in the said indenture, recorded in the proper office of the county clerk of Mobile county, in the State of Alabama, in mortgage book No. 3, pages 1 to 80, fully and at large set forth and declared. And whereas the whole of the

equitable and beneficial interest in the said messuages, lands, tenements, hereditaments, property, and appurtenances having been so vested in us as aforesaid by the said deed of conveyance, the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, and their respective wives, for the purpose of clothing said beneficial and equitable interest with the legal estate, did, by a certain indenture, bearing date the eighth day of September, A. D. one thousand eight hundred and forty-one, [intended to be forthwith recorded in the proper office in Mobile county, State of Alabama,] grant and convey unto us, and the survivors and survivor of us, and the heirs and assigns of the survivor of us, all the messuages, lands, tenements, hereditaments, property, and appurtenances, situate, lying and being in said Mobile county, State of Alabama, as they are particularly and at large set forth and described in the said indenture of the eighth day of September, 1841.

Now, therefore, for the greater certainty and identification of the said property with part of that whereof as above stated the beneficial interest was conveyed unto us by the said Bank of the United States, by the aforesaid indenture of the first day of May, 1841, we do declare that we stand seized of, and hold the said messuages, lands, tenements, hereditaments, and appurtenances, by the said indenture of the eighth day of September, one thousand eight hundred and forty-one, particularly described and conveyed unto us as aforesaid, or mentioned and intended so to be, unto us, and the survivors and survivor of us, and the heirs and assigns of such survivor, to our, his, and their own use and behoof forever.

Nevertheless, to, for, and upon the trusts, interests, and purposes, and with the incidents, powers, faculties, and abilities in and by the said indenture of the first day of May, in the year of our Lord one thousand eight hundred and forty-one, particularly set forth and declared, of and concerning the property therein and thereby mentioned and intended to be conveyed, and to, for, and upon no other trust, use, or purpose, whatsoever. And whereas it has been suggested to us that doubts may arise whether the said grantors in the said indenture of the eighth of September, 1841, have not, according to the laws of the State of Alabama, by the use of the words, "grant, bargain, and sell," or by the use of any other words in the said indenture, bound themselves to warrant unto us the title of the premises therein described. Now, therefore, we do further declare, that such was not the intention of the parties to the said indenture, and that by virtue thereof we do not claim to hold the said grantors to any other or further warranty or covenant of warranty, than that usually given by trustees against their own wilful and willing acts or omissions. And we do further declare that we do not intend, by the execution of these presents, to incur or subject ourselves to personal responsibility or liability in any respect whatever, except each for his own good faith in the administration of the trust hereby declared in regard to the property the legal title whereof may have vested in us by the said recited indenture of the eighth day of September, 1841.

In testimony whereof we have hereunto set our respective hands and seals, this twenty-third day of September, A. D. one thousand eight hundred and forty-one.

JAMES DUNDAS, [SEAL.]
MORDECAI D. LEWIS, [SEAL.]
SAM. W. JONES, [SEAL.]
ROBT. L. PITFIELD, [SEAL.]
ROBERT HOWELL. [SEAL.]

Sealed and delivered in presence of—
F. W. HUBBELL,
C. S. FOLWELL.

CITY OF PHILADELPHIA, *State of Pennsylvania.*

Be it remembered, that on this twenty-third day of September, A. D. one thousand eight hundred and forty-one, personally appeared before me, Benjamin Gerhard, commissioner of the State of Alabama for the State of Pennsylvania, James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L Pitfield, and Robert Howell, the declarants in the above deed or declaration of trust, who acknowledged that they and each of them signed, sealed, and delivered the foregoing deed or declaration of trust on the day and year therein mentioned.

Given under my hand and seal the day and year last above written.

B. GERHARD, *Commissioner.* [SEAL.]

Release of Cope and others to A. Hitchcock.

THE STATE OF ALABAMA, *Mobile county.*

Know all men by these presents, that whereas the president, directors, and company of the Bank of the United States, of the State of Pennsylvania, hold a bond executed by Henry Hitchcock, in his lifetime, to Thomas Dunlap, Herman Cope, and Joseph Cowperthwaite, in the sum of twelve hundred and forty-one thousand sixty $\frac{22}{100}$ dollars, which bond bears date 14th July, A. D. 1838, and to which there is a condition wherein the said Hitchcock acknowledges that he owes Joseph Cowperthwaite, Herman Cope, and Thomas Dunlap, in the sum of six hundred and twenty thousand five hundred and thirty $\frac{66}{100}$ dollars, with interest thereon, from the first day of March, 1838, at the rate of eight per cent. per annum; said interest payable semi-annually, on the first day of March and September of each year, until the entire principal and interest shall be paid; and which principal was made payable in five annual instalments as therein specified, to be paid in New York; and if not paid, that then, and in that case, the whole debt to come due and payable. And whereas the said Henry Hitchcock has executed a deed of mortgage to secure the payment of the money specified in the said bond, of a large number of houses and lands in the county of Mobile aforesaid, bearing date of the same day as the date of the bond, which said houses and lands have come to the

possession and seizure of Anne Hitchcock, devisee of the said Henry Hitchcock. And whereas the said Anne Hitchcock has delivered to the Bank of the United States aforesaid possession of the said lands and houses so devised to her, excepting certain property on Government street, south of the market, now in the possession of James Erwin.

Now, in consideration of the premises, the said Bank and the said Cowperthwaite, Dunlap, and Cope, shall not molest or disturb the representatives or heirs or devisees of said Hitchcock on said debt, and shall not make any claim upon any or either of them for payment of the same, but shall look to the mortgage aforesaid, and other conveyances of the said property for the satisfaction thereof, and shall not disturb or molest, or set up any claim against any person who may have become liable or bound in any manner for the payment of the same or any part thereof, either directly or collaterally. And the said bank, Cowperthwaite, Dunlap, and Cope, severally agree that all the notes and bills which are held, upon which the bond aforesaid is founded, if not now surrendered, shall be surrendered to the said Anne Hitchcock.

Witness our hands and seals, this 10th day of Feb. 1840.

(Signed) HERMAN COPE,
3d cashier of the Bank U. S.
HERMAN COPE,
For Cowperthwaite, Dunlap & Cope.

STATE OF ALABAMA,
Mobile county.

Before me, Jno. F. Everett, judge of the county court of Mobile county, personally came James Erwin, who, being sworn, says, that Herman Cope delivered him this instrument, and acknowledged that he executed the same for the purposes therein mentioned.

(Signed,) J. ERWIN.

Subscribed and sworn to before me, 20th May, 1840.

(Signed,) JNO. F. EVERETT.

Deed of James Erwin to Cowperthwaite and others.

To all people to whom these presents shall come, greeting:

Know ye, that James Erwin, of the city of New Orleans and State of Louisiana, for and in consideration of the sum of one hundred and fifty thousand dollars, lawful money of the United States of America, to them in hand paid by Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and forever quit claimed, and by these presents doth remise, release, and forever quit claim, unto the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, in their full and actual possession now being, and to the survivors and survivor of them, and the heirs, executors, and as-

signs of such survivor forever, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law as well as in equity, in possession as well as in expectancy, of, in, to, or out of all and singular that said parcel and lot of land lying and being in the city and county of Mobile, on the north side of Government street, between Royal and Water streets, having a front of two hundred and eight feet, by a depth of one hundred feet, bounded as follows: On the west by property of William R. Hallett and James Martin; on the south by property of Henry Hitchcock and others; on the east by the property now or late of Richard Tankersley; and on the north by Government street; together with all and singular the buildings, hereditaments, rights, privileges, and appurtenances unto the same belonging or in anywise appertaining; being the same premises which William Mayre, sheriff of Mobile county, granted and conveyed to the said James Erwin, by deed dated the seventh day of January, A. D. 1840, recorded in the office of the clerk of the county court of Mobile county, in book Z, pages 184, 185. To have and to hold the said released premises unto the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, to their own proper use, benefit, and behoof forever. So that neither the said James Erwin, his heirs or assigns, nor any other person or persons in trust for them, or in their name or names, or in the name, right, or stead of any of them, shall or will, can or may, by any ways or means whatever, hereafter have, claim, challenge, or demand any right, title, interest, or estate of, in, to, or out of the said premises above described and hereby released; but that he, the said James Erwin, his heirs and assigns, each and every of them, from all estate, right, title, interest, property, claim, and demand whatsoever, of, in, to, or out of the said premises or any part thereof, are, is, or shall be by these presents forever excluded and debarred—there being no warranty of title or possession, except as against the said James Erwin and all persons claiming by, through, or under him.

In witness whereof the said James Erwin has hereunto set [his] hand and seal, this tenth day of February, in the year of our Lord one thousand eight hundred and forty.

J. ERWIN. [SEAL.]

Signed, sealed, and delivered in the presence of—
T. G. BROWN,
Notary Public.
E. A. HITCHCOCK

THE STATE OF ALABAMA,
Mobile county, ss.

Be it remembered that the within named James Erwin, on the tenth day of February, A. D. 1840, appeared personally before me, Thomas G. Brown, a notary public in and for said county, and acknowledged

that he signed, sealed, and delivered the within deed of quit claim on the day and year, and for the uses and purposes, therein mentioned.

Witness my hand and seal notarial the day and year above mentioned.

T. G. BROWN,
Notary Public.

THE STATE OF ALABAMA,
Mobile county.

I, Drury Thompson, clerk of the county court of said county, certify that the foregoing is a transcript of the record of a deed from James Erwin to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, as recorded in my office in book Z, pages 548 and 549.

Given under my hand and seal of office this thirteenth day of April, A. D. 1843.

D. THOMPSON, *Clerk.*

Deed of A. Hitchcock to Cowperthwaite and others.

This indenture, made this eighth day of February, A. D. 1840, by and between Anne Hitchcock, widow and sole devisee of Henry Hitchcock, late of Mobile county, acting under and by virtue of the last will and testament, and the several codicils thereto annexed, of the said Henry Hitchcock, duly proved and of record in the orphans' court of Mobile county, of the first part, and Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, and State of Pennsylvania, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of seven hundred and seventy-three thousand four hundred and fifty-two dollars and twenty-three hundredths dollars, to her well and truly in hand paid, at and before the ensealing and delivery of these presents, by the said parties of the second part, the receipt whereof she doth hereby acknowledge, hath remised, released, conveyed, and forever quit claimed, and doth by these presents remise, release, convey, and forever quit claim, unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, all the estate, right, title, interest, use, trust, property, claim and demand whatsoever, at law as well as in equity, in possession as well as in expectancy, of, in, to, or out of all and singular the following described lands and premises, that is to say, all these three lots, with four-story brick stores with granite fronts thereon, beginning at a point on the north side of St. Francis street, in the city of Mobile, ninety feet west of Commerce street; thence running west on said street sixty-three feet to the premises of Robertson, Beal & Co., having a depth of seventy-six feet. Also a house and lot on the north side of St. Louis street, in said city, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street; thence running west on St. Louis street sixty-eight feet, having

a depth of one hundred and ten feet. Also a house and lot at the northwest corner of Church and St. Joachim streets, in said city, having a front on Church street of one hundred and thirteen feet, by a depth of eighty feet on St. Joachim street. Also a house and lot, situate on the north side of Government street in said city, having one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the Acre house.

Also a vacant lot on the north side of Government street, in said city, having sixty-six [feet] front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet. Also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Government street, by a depth of one hundred and sixty-six feet. Also four vacant lots on the north side of Government street, in said city, between Hamilton and Franklin streets, having a front of fifty feet on Government street, equal to two hundred and twenty feet, by a depth of one hundred and two feet. Also a vacant lot in the rear of the above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet.

Also those lots including a three-story brick dwelling and out-houses, on the north side of Government street, in said city, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty-two feet, by a depth of equal width of one hundred and fifty-five feet. Also fifty-four acres of ground in Mobile county, situate on the west side of Mobile bay, called and known as Frescati; bounded on the east by said bay, on the north by lands of James Innerarity, on the west by Dog river road, and on the north by a road leading from the said Dog river road to the bay, with all the buildings and appurtenances thereon. Also two three-story brick dwellings, with stores underneath, on the north side of Government street, in said city, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel. Also eight four-story brick dwellings, with stores underneath, on the south side of Government street, in said city, commencing fifty-two feet from the southeast corner of Government and Royal streets, having a front of twenty-six feet each, extending east toward Water street two hundred and eight feet, by a depth of one hundred feet. Also nine lots, twenty-four feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street two hundred and sixteen feet, by a depth of one and hundred and sixty-five feet on Church street, including a steam engine. Also ten lots of twenty-four feet six inches front, on the east side of Royal street, between Government and Church streets, in said city, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick. Also ten vacant lots, each twenty-eight feet front, on the north side of Saint

Francis street, in said city, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet. Also a lot fronting thirty-four feet on Joachim street, in the said city, by a depth of one hundred and sixty feet, in the rear of the above. Also a lot fronting thirty feet on Saint Joachim street, in said city, in the rear of the said above mentioned ten lots, between Joachim and Jackson streets, and one hundred and twenty feet deep. Also an entire square bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets, in the said city; and a water lot in front of the same, having three hundred and fifty feet on Water street, and running to the channel of the river Mobile, with a wharf thereon three hundred and twenty feet by ninety feet. Also a house and lot at the northwest corner of Saint Emanuel and Eslava streets, in said city, fronting sixty feet on Saint Emanuel street, by a depth of one hundred and thirty feet.

Also a house and lot at the northwest corner of Saint Louis and Jackson streets, in said city, eighty-five feet front on Saint Louis street, by a depth of hundred and twenty feet; together with all and singular the buildings, improvements, hereditaments, rights, members, privileges, and appurtenances, to all and singular the above mentioned and described lands and premises belonging or in any wise appertaining. To have and to hold all and singular the aforesaid lands, tenements, improvements, and appurtenances unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, to their own proper use, benefit, and behoof forever; so that neither the said party of the first part, her heirs and assigns, nor any person or persons whatsoever, in trust for them or her, or in her or their name or names, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest, or estate of, in, to, or out of all and singular the premises above described and hereby released and conveyed; but therefrom and thereout are, and shall be, by these presents, forever excluded and debarred.

In testimony whereof the said parties hereto set their hands and seals, the day and year above written.

ANNE HITCHCOCK. [L. S.]

Signed, sealed, and delivered in presence of us—
J. ERWIN,
T. G. BROWN,
Notary public.

STATE OF ALABAMA,
Mobile county.

Be it remembered, that the within named Anne Hitchcock, on the eighth day of February, A. D. 1840, appeared personally before me, Thomas G. Brown, a notary public in and for the county aforesaid,

and acknowledged that she signed, sealed, and delivered the within deed of quit claim, on the day and year, and for the uses and purposes, therein mentioned.

Witness my hand and seal notarial, the day and year above written.

T. G. BROWN,
Notary public.

THE STATE OF ALABAMA,
Mobile county.

I, Drury Thompson, clerk of the county court of Mobile county, certify, that the foregoing is a transcript of the record of a deed from Anne Hitchcock to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, as recorded in my office in book Z, pages 488, 489, and 490.

Given under my hand and seal of office, this fifteenth day of December, A. D. 1847.

[SEAL.]

D. THOMPSON, *Clerk.*

Testimony of S. G. Fisher.

EASTERN DISTRICT OF PENNSYLVANIA,
In the third circuit, ss.

Charles S. Folwell, of the county of Philadelphia, being duly affirmed according to law, he being conscientiously scrupulous for taking an oath, doth depose and say, that he is the clerk and agent for James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, citizens of Pennsylvania, who are the defendants in a certain bill in equity, filed in the circuit court of the United States, for the southern district of Alabama, wherein Anne Hitchcock, a citizen of Alabama is complainant, whereby she seeks to recover dower in eight four-story brick dwellings, and the parcel or lot of land whereon the same are erected, situate on the south side of Government street, in the city of Mobile, and that he is well acquainted with the merits of the said cause; that the testimony of Samuel Griffitts Fisher, now in the city of Philadelphia, is material and necessary for the said defendants, in the defence of the said cause, and that he, the said Samuel Griffitts Fisher, is now in the city of Philadelphia, which is at a greater distance from Mobile, the place of trial of the said cause, than one hundred miles. And this deponent further declares, that the said complainant, Anne Hitchcock, is not within one hundred miles of the city of Philadelphia, and that neither of her attorneys or solicitors is within one hundred miles of the city of Philadelphia.

CHAS. S. FOLWELL.

Affirmed to and subscribed by said Charles S. Folwell, at Philadelphia, in the district aforesaid, this twenty-eighth day of October, A. D. 1848, before me.

JOHN BINNS,
Commissioner appointed by the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits.

creditors of the said estate who were unsecured; that these creditors were principally mechanics and material men, whose claims arose out of labor and material furnished by them for the improvements on the premises mortgaged as aforesaid by the said Hitchcock to the said bank; that the property so mortgaged exceeded in value the amount of the debt charged thereupon; and that moreover, the question of usurious considerations entering into the said debt were still undetermined; that in this view of the case, if the bank would pay to the said complainant, the devisee, or to him, the said James Erwin, the sum of one hundred and fifty thousand dollars, to be applied to the payment of the said unsecured creditors, the said devisee would execute to the said bank, or its trustees or assigns, a full and perfect release and conveyance of all her estate, legal and equitable, of all and every nature whatsoever, whether in possession, in expectancy, or revision, of, in, to, or out of the said premises described in the said mortgage; and that for the purpose of putting them, the said bank, its trustees or assignees, into a full and perfect legal possession of the said premises, she, the said complainant, should assign then to them all and every the leases and contracts for the leasing of the said premises so embraced in the said mortgage; and further, that the said plea of usurious consideration, pleaded so as aforesaid by the said Hitchcock in his lifetime, should be withdrawn; and that by a decree, without opposition, the said bank, or its trustees or assignees, should have a foreclosure of the said mortgage and possession of the said premises. This proposition was finally acceeded to by the said Herman Cope, acting for the said bank and for his co-trustees, as well as for himself as trustee, and the said sum of one hundred and fifty thousand dollars was agreed by him to be paid on the delivery by the said James Erwin to the agent of the said bank and its trustees of the release above specified and agreed to be given, and the assignment of the said leases and contracts for leases as aforesaid. The said James Erwin, acting for and on behalf of the said complainant and devisee as aforesaid, brought to the office of this deponent the deed of release so as aforesaid agreed to be given by the devisee, duly signed, sealed, and acknowledged, according to the laws of the State of Alabama, and also the assignments of the leases and contracts for leasing so as aforesaid. These papers were delivered to this deponent at his office in the city of Mobile by the said James Erwin, and by this deponent the same were delivered to Herman Cope; upon which delivery to him, the said Cope, the said sum of one hundred and fifty thousand dollars was paid by the said Herman Cope in the presence of this deponent to the said James Erwin, acting as the agent of the said devisee as aforesaid. As a cumulative title to the rights so as aforesaid acquired by the bank so as aforesaid, and its trustees, the said James Erwin proposed to release to the said bank and its trustees whatever right he, the said James Erwin, might have acquired to the eight stores, known as the Government street stores, by reason of a purchase which he, the said James Erwin, had made at a sale made by the sheriff of Mobile county by virtue of an execution issued against the said Henry

Hitchcock. This pretended title of the said James Erwin the said Cope had been advised by counsel was a nullity, as it has since been determined to be both by the courts of Alabama and the courts of the United States; but inasmuch as the deed from the said sheriff to the said Erwin, covering the said premises, was a matter of record, it was deemed prudent to take the said Erwin's release. The said Erwin tendered to this deponent a deed of release or quit-claim to the said five stores to the said bank or its trustees, and asked the said deponent what should be inserted in the said deed as the consideration thereof; to which the said deponent replied that it was a matter of indifference to him so long as the consideration expressed on the face of the deed was a valuable consideration within the statute. The said James Erwin then asked of this deponent if he had any objection to the stating of the said sum of one hundred and fifty thousand dollars as the consideration, saying that he had an object of his own in doing so; to which this deponent replied, that he did not consider the release worth any thing, and was therefore indifferent about the consideration. The sum of one hundred and fifty thousand dollars was thereupon inserted as the consideration for the release of him, the said James Erwin.

S. GRIFFITTS FISHER.

EASTERN DISTRICT OF PENNSYLVANIA,
In the third circuit.

I, John Binns, a commissioner appointed by the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits, do certify, that the above and foregoing written deposition of Samuel Griffitts Fisher was taken as aforesaid, because the said Samuel Griffitts Fisher is now living *in* at Philadelphia, in the State of Pennsylvania, which is a greater distance from Mobile, in the State of Alabama, the place of trial of the said suit in equity, pending in the circuit court of the United States, for the fifth judicial circuit, southern district of Alabama, wherein Anne Hitchcock, a citizen of the State of Alabama, is complainant, and James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, citizens of the State of Pennsylvania, are defendants, than one hundred miles. And I further certify, that I caused no notification from me to the said Anne Hitchcock, complainant as aforesaid, to be present at the taking of the said deposition, and to put interrogatories if she thought fit, to be first made out and served on the said Anne Hitchcock, or either of her attorneys or solicitors, because neither the said Anne Hitchcock, nor either of her attorneys or solicitors, is or was, at the time of taking of such deposition, or at any time since the application made to me to take the same, within one hundred miles of the city of Philadelphia, where the said deposition was taken. And I further certify, that the said deponent was by me carefully examined, and cautioned, and sworn, according to law, to testify the whole truth, and that he, in my presence, subscribed the whole testimony, so by him given, after the same was reduced to writing, and that the same was

so reduced to writing by me. And I further certify, that I am not, and was not at the time of taking said deposition, of counsel or attorney to either of the parties to said suit or cause; and that I am not, and was not at the time of taking the said deposition, interested in the event of the said suit or cause.

In testimony whereof I have hereunto set my hand and seal, this 28th day of October, in the year one thousand eight hundred and forty-eight.

JOHN BINNS,

Commissioner appointed by circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits.

Testimony of Henry Cope.

EASTERN DISTRICT OF PENNSYLVANIA.

In the third circuit, ss.

Charles S. Folwell, of the county of Philadelphia, being duly affirmed according to law, he being conscientiously scrupulous of taking an oath, doth depose and say, that he is the clerk and agent for James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, citizens of Pennsylvania, who are the defendants, in a certain bill in equity, filed in the circuit court of the United States, for the southern district of Alabama, wherein Anne Hitchcock, a citizen of Alabama, is complainant, whereby she seeks to recover dower in eight four-story brick dwellings, and the parcel or lot of land whereon the same are erected, situate, with granite fronts thereon, on the south side of Government street, in the city of Mobile, and that he is well acquainted with the merits of the said cause; that the testimony of Herman Cope, of the city of Philadelphia, is material and necessary for the said defendants in the defence of the said cause; and that he, the said Herman Cope, lives in the city of Philadelphia, which is at a greater distance from Mobile, the place of trial of the said cause, than one hundred miles; and this deponent further declares, that the said complainant, Anne Hitchcock, is not within one hundred miles of the city of Philadelphia, and that neither of her attorneys or solicitors is within one hundred miles of the city of Philadelphia.

CHAS. S. FOLWELL.

Affirmed and subscribed by said Charles S. Folwell, at Philadelphia in the district of aforesaid, this twenty-fifth day of October, A. D. 1848, before me. JOHN BINNS,

Commissioner appointed by the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits.

EASTERN DISTRICT OF PENNSYLVANIA.
In the third circuit, ss.

Let Herman Cope, the witness named in the above deposition, be examined before me, at 5½ o'clock, p. m, of the twenty-sixth day of October, A. D. 1848, in pursuance of the thirtieth section of the act of Congress of the United States of America, entitled "an act to establish the judicial courts of the United States."

JOHN BINNS,
Commissioner appointed by the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits.

ANNE HITCHCOCK, a citizen of the State of Alabama,
vs.
JAMES DUNDAS, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, citizens of the State of Pennsylvania. } In chancery.

In the circuit court of the United States, for the fifth judicial circuit, southern district of Alabama.

Be it remembered, that on the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and forty-eight, at 5½ o'clock, p. m., in the city of Philadelphia, in the eastern district of Pennsylvania, in the third circuit, personally appeared before me, John Binns, esqr., a commissioner appointed by the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits, Herman Cope, who being carefully examined, and cautioned, and affirmed, he being conscientiously scrupulous of taking an oath, to testify the whole truth, did depose and say:

I was in the employ of the Bank of the United States in the years 1838, 1839, and 1840, in the capacity of third assistant cashier, charged with the superintendence of the suspended debt and real estate of the said bank, in Philadelphia and elsewhere, and continued in the service of the said bank until it made an assignment of all its real and personal property, excepting some stocks therein specified and reserved, on the 4th of September, 1841, to James Robertson and others, in trust, and of whom I am one. I then left the service of the bank to attend to my duties as one of said trustees under the said assignment; that among the debtors of the bank was Henry Hitchcock, of the city of Mobile, in the State of Alabama, upon a bond dated March the first, 1838, for six hundred and twenty thousand five hundred and thirty dollars $\frac{86}{100}$, secured by mortgage of certain real estate therein described, as will appear by reference thereto, or the record thereof, in the proper office of the said city of Mobile. That debt, by subsequent loans or advances, and a computation of the interest accrued, was increased to the

sum of seven hundred and forty-three thousand six hundred and eighty-two dollars $\frac{48}{100}$, on the first of September, 1839, as will appear by the account stated by the bank, up to that date; and further increased after that date, to wit, by the advance and payment to James Erwin, as the agent or attorney of Mrs. Anne Hitchcock, widow and sole devisee of the said Henry Hitchcock, deceased, in January, 1840, of one hundred and fifty thousand dollars, and the additional sum of fifteen thousand dollars in February, 1840, which, together with the interest accrued and computed in the account, made an aggregate amount owing by Henry Hitchcock's estate to the said bank, on the 12th of February, 1840, of nine hundred and thirty-two thousand eight hundred and thirty $\frac{67}{100}$, as appears by a copy of the said account I have examined, under date of the 23d of March, 1840. This amount is exclusive of what was then called the Gordon company debt. About the close of the year 1839, I visited Mobile in my official capacity, under a letter of instructions from the president of the bank, dated 23d November, 1839, for the purpose of making a personal examination into the affairs of the bank at that point, and for the further purpose of effecting settlements where it was practicable with the debtors there. While in Mobile I had frequent conversations with James Erwin, who professed to have, and as I believe had, full authority from Henry Hitchcock, in his lifetime, and after his death from his widow and sole devisee, Mrs. Anne Hitchcock, to act in the matter for them on the subject of the said Hitchcock's indebtedness to the bank, and which finally resulted in a verbal proposition from him, as the agent and attorney of the said Mrs. Hitchcock, to me as the agent of the Bank of the United States, in substance and effect as follows: the said Erwin alleged that there were certain enumerated confidential debts owing by the estate of Henry Hitchcock, and unprotected or unprovided for by him, the said Henry, in his lifetime, among which was one to him, the said Erwin, of forty-six thousand two hundred and fifty dollars, and amounting in all together to upwards of two hundred and forty thousand dollars; and also certain other enumerated large debts, represented by him to be owing by the estate to the banks in Mobile, not fully secured, for upwards of five hundred thousand dollars; all of which debts Mrs. Hitchcock and himself were together very desirous of having settled and put out of the way of their settlement; also of the claim of the Bank of the United States, by the conveyance to it of all the real estate covered by the mortgage of Henry Hitchcock to the said bank. He, the said Erwin, proposed that for the sum or consideration of one hundred and fifty thousand dollars, in the post notes of the Bank of the United States, payable fifty thousand dollars in one year, and one hundred thousand dollars in two years, with interest on the whole from date, to be paid to him, the said Erwin, by the said bank, to enable him therewith, as he alleged, to compromise and settle the confidential and unprotected debts above referred to, he would procure a legal and sufficient release and conveyance, by and from the said Mrs. Anne Hitchcock, of all and singular the said real estate, in such manner as to vest effectually the legal and equitable title thereto in the said bank or its appointee, free from incumbrance of any kind other than the said mortgage of the

bank, with a delivery also of the possession of the premises at the same time, and that she should assign all the leases to the said bank or its appointee. And as a further inducement to me to accede to his said proposal, the said Erwin suggested that, by the compromise and discharge of the said confidential and unprotected claims above mentioned in the manner proposed, there would then be no one to call in question the validity of the bank's title to the real estate under the release and conveyance of Mrs. Hitchcock, as all the claims against the estate of Henry Hitchcock would thus be previously satisfied and discharged. This proposition for a settlement was afterwards repeated to me by said Erwin, in the name, and as he informed me, on behalf of the said Mrs. Hitchcock, in the office and in the presence and hearing of Samuel Griffith Fisher, esq., the solicitor and law adviser of the said Bank of the United States at Mobile; and in order the better to carry into effect the said compromise, Mrs. Hitchcock would decline to act as executrix of the estate, and he, Erwin, would then get his brother, Andrew or Isaac, I do not remember which, to become a friendly administrator in her stead, with a previous and distinct understanding between them that said administrator, when thus appointed, should consent to and permit the regular foreclosure of the said mortgage of the bank, without hindrance or molestation from him or any one else on behalf of Mrs. Hitchcock or the estate. The terms of compromise thus proposed by said Erwin on behalf of the said Mrs. Hitchcock were provisionally accepted by me, subject to the confirmation or rejection by the board of directors of the Bank of the United States, and I then requested the said Erwin to address me a letter, stating his proposition, in order that I might transmit it for the consideration and action of the bank upon it in Philadelphia. This he did at the moment and before leaving Mr. Fisher's office, in which we were at the time. This letter, dated January the 4th, 1840, was not so full and specific as our said verbal agreement; but as our solicitor, Mr. Fisher, to whom I then submitted it for advice, did not object to it, I accepted it as containing at least the substance of our said verbal agreement, and very soon afterwards transmitted said letter, in one I wrote on the subject to the bank in Philadelphia, for the decision of the board of directors upon it. The letter referred to I am not able now to produce, the same having been sent to H. Barney, esq., agent at Mobile, to be used as evidence in the suit of Cowperthwaite and others vs. Erwin, administrator of Hitchcock, then pending there. In due time I received a reply from the bank, giving me authority to make the proposed compromise, and also the post notes contracted to be delivered to the said Erwin. These post notes I accordingly delivered to the said Erwin, on or about the 10th of February, 1840, in Mobile, in the presence of said Fisher, and I think of Mr. Campbell, Erwin's counsel in the case, in fulfilment of said contract on the part of the bank, and then received from him, the said Erwin, the deed of release and conveyance, executed by Anne Hitchcock to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the appointees of the said bank, dated on the 8th day of

February, 1840, and acknowledged before T. G. Brown, notary public, on the same day, as I believe, but refer to the original deed itself for greater certainty, but which I am now unable to produce, it not being in my possession; and with said deed I also received, I think, the several assignments of all the leases of the said property which were then existing in writing, and the formal delivery of the possession of all the property mentioned in her said deed; and thereupon I executed in writing, as I believe, a full release and discharge to the legal representatives of the said Henry Hitchcock, in the manner, and upon the terms and conditions, and with reservations expressed in the instrument itself, signed by me as third assistant cashier, and on behalf of Cowperthwaite, Dunlap, and Cope, dated 10th February, 1840; the original of which is not now in my possession, and I cannot therefore now produce it; but a certified copy of which is now before me, and which I believe to be a true copy, and therefore annex it hereto, marked A, and which was in fulfilment and final execution of our said agreement. It having been the distinct understanding and agreement between the said Erwin and myself, as I then considered and still do believe, that the release and conveyance by Mrs. Hitchcock to the said Cowperthwaite, Dunlap, and Cope, carried with it and vested in them an absolute and unconditional estate, freed from all claim of dower or otherwise of the said Mrs. Anne Hitchcock, and of all claim of the legal representatives of the said Henry Hitchcock, deceased, in and to the said property. The copy of the account rendered on the 23d of March, 1840, and referred to in a former part of this deposition, is contained in the account current book of the said Bank of the United States, one of the books of the said corporation, but I have hereto attached a true copy thereof, marked B. The letter of instructions from the president of the bank to me, dated November 23d, 1839, referred to in the former part of this deposition, I find is attached to my answer in the suit of Cowperthwaite, Dunlap, and Cope, vs. Erwin, administrator of Hitchcock, in the court at Mobile, and I cannot therefore now produce it. My impressions and belief are, that the said Mrs. Anne Hitchcock claimed to be, and was, in the possession, as the sole devisee of Henry Hitchcock, deceased, of the said real estate described in her said deed of conveyance, dated on the 8th of February, 1840, before referred to, and that the instrument of writing was executed by me as third assistant cashier of the Bank of the United States, and also on behalf of Cowperthwaite, Dunlap, and Cope, with full authority from the said bank and my co-trustees. The letter from the bank in reply to mine transmitting the letter of said Erwin of the fourth of January, 1840, and authorizing me to compromise the claim against Henry Hitchcock's estate, as before mentioned, I am unable now to produce, and believe that it was attached to my answer in the suit of Cowperthwaite and others vs. Erwin, administrator of Hitchcock. I would further add, that the said James Erwin had informed me in the course of our said negotiation, and afterwards repeated in the presence of Samuel Griffith Fisher, esq., I believe, that he had purchased at sher-

iff's sale, for the sum of about fifty dollars, I think, the eight stores on the south side of Government street, included in Hitchcock's said mortgage, with a view of fortifying his position in his negotiation with the Bank of the United States for a settlement of Henry Hitchcock's debt to it, and also to guard against any trouble or difficulty which might otherwise arise in the way of such settlement in the possible event of those stores being bid off or purchased at said sale by any stranger or other person; but that he meant and would, in case we should come to an agreement for settlement of said claim against Hitchcock's estate on the terms proposed, convey and release to the said bank, or its appointee, all and whatever title he had thus acquired to the said eight stores, and this was therefore to be considered and understood as forming part of our said agreement. The consideration of one hundred and fifty thousand dollars inserted in James Erwin's deed of conveyance or release to the said bank for the eight stores mentioned on Government street, was made by him subsequently to our said agreement for a settlement, and entirely independent of that agreement. The said insertion was assented to by me afterwards, only upon the urgent request of the said Erwin for his individual accommodation, in facilitating, as he then alleged it would, his settlement of the said confidential and unprotected debts of the said Henry Hitchcock, before referred to, with which the said bank had nothing to do, and was not in any way to affect, impair, or change in any manner our said agreement, as mentioned in his, the said Erwin's, letter to me of the 4th January, 1840, before referred to; I only yielded to said Erwin's request in the matter for the reasons stated by him, upon the distinct understanding that it formed no part of our said agreement; and for the further reason, also, that Mr. Fisher, the solicitor of the bank, after examining the deed, expressed to me the opinion, that no difficulty or disadvantage could arise to the bank from the insertion of that sum as a nominal consideration in the said deed.

HERMAN COPE.

EASTERN DISTRICT OF PENNSYLVANIA,
In the third circuit, ss.

I, John Binns, a commissioner appointed by the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, to take acknowledgments of bail and affidavits, do certify, that the above and foregoing deposition of Herman Cope was taken as aforesaid, because the said Herman Cope lives at Philadelphia, in the State of Pennsylvania, which is at [a greater] distance from Mobile, in the State of Alabama, the place of trial of the said suit in equity pending in the circuit court of the United States, for the fifth judicial circuit, southern district of Alabama, wherein Anne Hitchcock, a citizen of the State of Alabama, is complainant, and James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell,

citizens of the State of Pennsylvania, are defendants, than one hundred miles. And I further certify, that I caused no notification from me to the said Anne Hitchcock, complainant as aforesaid, to be present at the taking of the said deposition, and to put interrogatories, if she thought fit, to be first made out and served on the [said] Anne Hitchcock, or either of her attorneys or solicitors, because neither the said Anne Hitchcock, nor either of her attorneys or solicitors, is, or was, at the time of taking such deposition, or at any time since the application made by me to take the same, within one hundred miles of the city of Philadelphia, where the said deposition was taken.

And I further certify, that the said deponent was by me carefully examined, and cautioned, and affirmed, he being conscientiously scrupulous of taking an oath, to testify the whole truth; and that he, in my presence, subscribed the testimony so by him given, after the same was reduced to writing by me. And I further certify, that I am not, and was not at the time of taking said deposition, of counsel or attorney to either of the parties to said suit or cause; and that I am not, and was not at the time of taking said deposition, interested in the event of said suit or cause.

In testimony whereof I have hereunto set my hand and seal this 26th day of October, in the year one thousand eight hundred and forty-eight.

JOHN BINNS,

[SEAL.] *Commissioner appointed by the circuit court of the United States for the eastern district of Pennsylvania, and in the third circuit, to take acknowledgments of bail and affidavits.*

A.

JOHN BINNS, *U. S. Commissioner.*

October 26, 1848.

THE STATE OF ALABAMA,
Mobile county.

Know all men by these presents, that whereas the president, directors, and company of the Bank of the United States of the State of Pennsylvania, held a bond executed by Henry Hitchcock, in his lifetime, to Thomas Dunlap, Joseph Cowperthwaite, and Herman Cope, in the sum of twelve hundred and forty-one thousand sixty-one $\frac{33}{100}$ dollars, which bond bears date 14th day of July, A. D. 1838; and to which there is a condition wherein the said Hitchcock acknowledges that he owes Joseph Cowperthwaite, Henry Cope, and Thomas Dunlap, in the sum of six hundred and twenty thousand five hundred and thirty $\frac{66}{100}$ dollars, with interest thereon from the first day of March, 1838, at the rate of 8 per cent. per annum; said interest payable semi-annually, on the first days of March and September of each year, until the entire principal and interest shall be paid; and which principal was made payable in four annual instalments as therein specified, to be paid in New York; and if not paid, that then, and in that case, the whole debt to become due and payable. And whereas the said Henry Hitchcock has

executed a deed of mortgage to secure the payment of the money specified in the said bond, of a large number of houses and lands in the county of Mobile aforesaid, bearing date of the same day as the date of the bond, which said houses and lands have come to the possession and seizure of Anne Hitchcock, devisee of the said Henry Hitchcock. And whereas the said Anne Hitchcock has delivered to the Bank of the United States aforesaid possession of the said lands and houses so devised to her, excepting certain property on Government street, south of the market, now in the possession of James Erwin: Now, in consideration of the premises, the said bank, and the said Cowperthwaite, Dunlap, and Cope, severally agree that the said bank, and the said Cowperthwaite, Dunlap, and Cope, shall not molest or disturb the representatives, or heirs, or devisees of said Hitchcock on said debt, and shall not make any claim upon any or either of them for payment of the same, but shall look to the mortgage aforesaid and other conveyances of the said property for the satisfaction thereof, and shall not disturb, or molest, or set up any claim against any persons who may have become liable, or bound in any manner for the payment, either directly or collaterally; and the said bank, Cowperthwaite, Dunlap, and Cope, severally agree that all the notes and bills which are held upon which the bond aforesaid is founded, if not now surrendered, shall be surrendered to the said Anne Hitchcock.

Witness our hands this 10th day of February, 1840.

HERMAN COPE,
3d A. Cas. of the Bank of U. States.
HERMAN COPE,
COWPERTHWAITE,
DUNLAP & COPE.

STATE OF ALABAMA,
Mobile county.

Before me, John F. Everett, judge of the county court for the county of Mobile, personally came James Erwin, who being sworn, says that Herman Cope delivered him this instrument, and acknowledged that he executed the same for the purposes therein mentioned.

JAMES ERWIN.

Subscribed and sworn before me, 20th May, 1840.

JNO. F. EVERETT.

THE STATE OF ALABAMA,
Mobile county, ss.

I, William Taylor, clerk of the county court of said county, certify, that the foregoing is a transcript of the record of an instrument of writing from Herman Cope and others to Anne Hitchcock, as recorded in my office, of book of miscellanies D, pages 41 and 42.

Given under my hand and seal of office, this twenty-first day of August, A. D. 1840.

WM. TAYLOR, *Clerk.*

B.

JOHN BINNS, *U. S. Comm'r,*
October 26, 1848.

Henry Hitchcock, esq.,
To Bank of the United States.

1838.			
March 1	To mortgage of this date, with int. at 8 per cent.....	$630,530 96	
	" interest to 1st Sept., 1838, at 8 per ct., per statement rendered.....		$20,146 58
May 5	" mortgage of Wright et al., and int. to date.....	11,000 00	
	" interest to 1st Sept, 1838, at 8 per cent..3m. 26d.....		283 56
Aug. 18	" mortgage to A. L. J. & H., with int. to date.....	9,080 50	
	" interest to 1st Sept., 1838, at 8 per cent.....14d.....		28 95
		640,611 46	20,458 39
Sept. 1	To balance due this day.....$661,069 85		
	" interest on $640,611 46, to 1st March, 1839, 6m, at 8 per cent.....		25,624 46
Oct. 2	" mortgage to McL. & H., with int. to date.....	11,894 67	
	" interest to March 1st, 1839, at 8 per ct..4m. 27d.....		388 57
1839.			
Feb. 14	" mortgage to Ogden, F. & Co., with int. to date..	15,679 99	
	" interest to 1st March, 1839, at 8 per cent.....15d.....		52 27
" 19	" mortgage to Gazzam & H., with int. to date.....	4,077 70	
	" interest to 1st March, 1839, at 8 per cent....10d.....		9 05
			46,532 74
" 4	By payment of rent notes left for collection....$4,400		
" 12	" " " " "..... 125.....		4,525 00
		672,263 82	42,007 74
1839.			
March 1	To balance due this date.....$714,271 56		
	" interest on $672,263 82, to 1st Sept., 1839, at 8 per cent.....6m.....		26,890 55
" 23	" interest on mortgaged property paid in New York	2,148 50	
	" interest to 1st Sept., 1839, at 8 per cent...5m. 9d.....		75 92
" 26	" insurance on same, paid in Mobile.....	121 00	
	" interest to 1st Sept., 1839, at 8 per cent..5m. 6d.....		4 20
			68,978 41
April 5	By payment of rent note.....$126 57		
" 17	" " "..... 127 00.....		253 57
			68,724 84
	Carried forward.....	$674,533 32	$68,724 84
1839.	To amount brought forward.....	674,533 32	68,724 84
June 1	To insurance paid on property in Mobile.....	416 00	
	" interest to 1st Sept., 1839, at 8 per cent.....3m.....		8 32
		674,949 32	68,733 16
Sept. 1	" balance of interest account.....	68,733 16	
1839.			
Sept. 1	" balance due this date.....	743,682 48	
	" interest on $674,949 32, from 1st Sept. to 12th Feb., at 8 per cent.....5m. 11d.....		24,148 19
1840.			
Jan. 23	" post notes due 1st Feb., 1841.....$53,000		
	Deduct interest..... 3,000		
		50,000 00	

Account—Continued.

Jan. 23	To post notes due 1st Feb., 1842.....$112,000 Deduct interest..... 12,000	100,000 00	
Feb. 12	" cash paid for the engine for cotton press.....	15,000 00	
	" interest as above.....	24,148 19	24,148 19
1840.			
Feb. 12	" balance due this day.....	$932,830 67	
	Amount of principal.....$839,949 32 Do. interest..... 92,881 35 $932,830 67		

E. E.—*Bank of the United States*, 23*d March*, 1840.

Testimony of H. Barney.

United States of America, circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama.

ANNE HITCHCOCK
vs.
JAMES DUNDAS and others.

To Benjamin Gerhard and William L. Schaffer, esq'rs, greeting:

Know ye, that we, reposing especial trust and confidence in your prudence and fidelity, have appointed you, and by these presents do give you full power and authority to examine Hindman Barney and Samuel G. Fisher, as witnesses on behalf of the defendants, in a certain cause in equity now pending in said court, wherein Anne Hitchcock is complainant, and James Dundas and others, trustees of the Bank of the United States of Pennsylvania, are defendants. And, therefore, we command you that you do cause the said Hindman Barney and Samuel G. Fisher to *be* come before you, and after being duly sworn, that you do examine them upon the interrogatories and cross interrogatories hereto annexed; and the answers to the same being plainly and distinctly written, you are to close up the same under your hands and seals, and return the same into our said court with all convenient speed.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said circuit court, this second Monday of April, in the year of our Lord one thousand eight hundred and forty-eight.

Issued the twenty-sixth day of September, 1848.

Attest: JOHN FITTS, *Clerk.*

The execution of this commission appears in a certain schedule hereunto annexed. Witness our respective hands and seals, this twenty-fourth day of October, A. D. 1845.

B. GERHARD, [L. S.]
W. L. SCHAFFER, [L. S.]
Commissioners.

B.

JOHN BINNS, *U. S. Comm'r,*
October 26, 1848.

Henry Hitchcock, esq.,
To Bank of the United States.

1838.			
March 1	To mortgage of this date, with int. at 8 per cent.....	$690,530 96	
	" interest to 1st Sept., 1838, at 8 per ct., per statement rendered.....		$20 146 58
May 5	" mortgage of Wright et al., and int. to date.....	11,000 00	
	" interest to 1st Sept, 1838, at 8 per cent..3m. 26d.....		283 56
Aug. 18	" mortgage to A. L. J. & H., with int. to date.....	9,080 50	
	" interest to 1st Sept., 1838, at 8 per cent.....14d.....		28 25
		640,611 46	20,458 39
Sept. 1	To balance due this day.....$661,069 85		
	" interest on $640,611 46, to 1st March, 1839, 6m, at 8 per cent.....		25,694 46
Oct. 2	" mortgage to McL. & H., with int. to date.....	11,894 67	
	" interest to March 1st, 1839, at 8 per ct..4m. 27d.....		388 57
1839.			
Feb. 14	" mortgage to Ogden, F. & Co., with int. to date..	15,679 99	
	" interest to 1st March, 1839, at 8 per cent.....15d.....		52 27
" 19	" mortgage to Gazzam & H., with int. to date.....	4,077 70	
	" interest to 1st March, 1839, at 8 per cent....10d.....		9 05
			46,532 74
" 4	By payment of rent notes left for collection....$4,400		
" 12	" " " " ".....125.....		4,525 00
		672,263 82	42,007 74
1839.			
March 1	To balance due this date.....$714,271 56		
	" interest on $672,263 82, to 1st Sept., 1839, at 8 per cent.....6m.....		26,890 55
" 23	" interest on mortgaged property paid in New York	2,148 50	
	" interest to 1st Sept., 1839, at 8 per cent...5m. 9d.....		75 92
" 26	" insurance on same, paid in Mobile.....	121 00	
	" interest to 1st Sept., 1839, at 8 per cent..5m. 6d.....		4 20
			68,978 41
April 5	By payment of rent note.....$126 57		
" 17	" " ".....127 00.....		253 57
			68,724 84
	Carried forward.....	$674,533 32	$68,724 84
1839.	To amount brought forward.....	674,533 32	68,724 84
June 1	To insurance paid on property in Mobile.....	416 00	
	" interest to 1st Sept., 1839, at 8 per cent.....3m.....		8 32
		674,949 32	68,733 16
Sept. 1	" balance of interest account.....	68,733 16	
1839.			
Sept. 1	" balance due this date.....	743,682 48	
	" interest on $674,949 32, from 1st Sept. to 12th Feb., at 8 per cent.....5m. 11d.....		24,148 19
1840.			
Jan. 23	" post notes due 1st Feb., 1841.....$53,000		
	Deduct interest..... 3,000		
		50,000 00	

Account—Continued.

Jan. 23	To post notes due 1st Feb., 1842.....$112,000			
	Deduct interest..... 12,000			
			100,000 00	
Feb. 12	" cash paid for the engine for cotton press.....		15,000 00	
	" interest as above.....		24,148 19	24,148 19
1840.				
Feb. 12	" balance due this day.....		$932,830 67	
	Amount of principal.....$839,949 32			
	Do. interest..... 92,881 35			
		$932,830 67		

E. E.—*Bank of the United States*, 23*d March*, 1840.

Testimony of H. Barney.

United States of America, circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama.

ANNE HITCHCOCK
vs.
JAMES DUNDAS and others.

To Benjamin Gerhard and William L. Schaffer, esq'rs, greeting:

Know ye, that we, reposing especial trust and confidence in your prudence and fidelity, have appointed you, and by these presents do give you full power and authority to examine Hindman Barney and Samuel G. Fisher, as witnesses on behalf of the defendants, in a certain cause in equity now pending in said court, wherein Anne Hitchcock is complainant, and James Dundas and others, trustees of the Bank of the United States of Pennsylvania, are defendants. And, therefore, we command you that you do cause the said Hindman Barney and Samuel G. Fisher to *be* come before you, and after being duly sworn, that you do examine them upon the interrogatories and cross interrogatories hereto annexed; and the answers to the same being plainly and distinctly written, you are to close up the same under your hands and seals, and return the same into our said court with all convenient speed.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said circuit court, this second Monday of April, in the year of our Lord one thousand eight hundred and forty-eight.

Issued the twenty-sixth day of September, 1848.

Attest: JOHN FITTS, *Clerk.*

The execution of this commission appears in a certain schedule hereunto annexed. Witness our respective hands and seals, this twenty-fourth day of October, A. D. 1845.

B. GERHARD, [L. S.]
W. L. SCHAFFER, [L. S.]
Commissioners.

ANNE HITCHCOCK
vs.
JAMES DUNDAS and others.

In the circuit court of the United States—in chancery—two cases.

Interrogatories to be exhibited to Hindman Barney, Samuel G. Fisher, material witnesses for the defendants in the said two suits.

1. Do you know the parties to this suit?

2. Do you know the terms upon which a settlement was made between the agent of the Bank of the United States of Pennsylvania, or its trustees, and the plaintiff in this suit, of a controversy which had existed between the said bank and Henry Hitchcock in his lifetime, and in which the said plaintiff made the conveyance specified in the pleadings of her interest in the property, specified in the pleadings of this cause? Please state in what manner the controversy originated, and to what length it had proceeded in the life of Judge Hitchcock. Will you state if Anne Hitchcock, after the death of Henry Hitchcock, undertook any control over the said property? Did she make leases of it, and in what capacity did she act? Will you state the terms of the settlement, and attach to your answers all the papers connected with it, and all evidences in writing, showing her prior control over the said lands?

3. If you have in your possession, or can produce, any papers executed by Anne Hitchcock, evincing her acceptance of the trusts of the will, attach the same to your answers to this interrogatory.

4. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them; or that may be material to the subject of this examination or the matters in question in the cause? If you set forth the same fully and at large in your answer.

CAMPBELL & CHANDLER,
For defendant.

Mrs. ANNE HITCHCOCK, or
STEWART & EASTON, *counsellors.*

Take notice, that interrogatories, copies of which will be furnished to you, have been filed in the office of the clerk of the circuit court of the United States, for the witnesses named in the caption. You are requested to file cross interrogatories, if you desire to do so, according to the rule.

You will also take notice, that witnesses will be examined at the hearing of the cause to prove the exhibits, and that you are requested to file with your cross interrogatories, or to produce before the commissioners, the release of the bank of the United States, and of its trustees, Herman Cope, Thomas Dunlap, & Joseph Cowperthwaite, to the said Anne Hitchcock, of the debt due them on account of the mortgage of Henry Hitchcock of the lands specified in the pleadings in the cause and in the mortgage, a copy of which is attached to the answer of the defendants.

CAMPBELL & CHANDLER,
August 22, 1848. *For defendants.*

Due notice of the filing of the foregoing interrogatories has been rec'd, and also of said notice, and the order of the judge for issuing commission is waived.

September 27, 1848.

STEWART & EASTON,
Solrs. for A. Hitchcock.

Cross interrogatories.

1. If any settlement was made between the bank and Mrs. Hitchcock, please state who made it; please state if you know of any act done by Mrs. Hitchcock, other than what she signed, and how you know it. Please state if Mr. Cope ever saw Mrs. Hitchcock, during his visit to Mobile. Did you converse with Mrs. Hitchcock yourselves about the settlement when it was made? Do you know whether she knew of the terms of the settlement, and how do you know it? Did she ever give any power in writing to James Erwin or otherwise, what was it, and how do you know it? State all you know of your own knowledge as to the power and authority given by her to James Erwin, and her knowledge of the settlement at the time.

STEWART & EASTON,
Solrs. for complainant.

Filed August 24th, 1848.

JOHN FITTS, *Clerk.*

Rec'd 24th August, 1848, and executed on Stewart and Easton 25th August, 1848.

J. G. LYON, *U. S. M.*
By GEO. BANCROFT, *D. M.*

Fees, $3.

Deposition of a witness produced, sworn, and examined on the twenty-fourth day of October, A. D. 1848, in the city of Philadelphia, in the State of Pennsylvania, by virtue of a commission issuing from the circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama, to Benjamin Gerhard and W. L. Schaffer, esquires, directed for the examination of witnesses in a certain cause pending in said court, wherein Anne Hitchcock is plaintiff, and James Dundas and others are defendants.

Hindman Barney, of the city of Mobile, in the State of Alabama, gentleman, aged thirty-seven years or thereabouts, being produced, sworn, and examined on behalf of the defendants, deposeth as follows:

1. To the first interrogatory on the part of the defendant he answers as follows:

I know the parties to this suit.

2. To the second interrogatory on the part of the defendant he answers as follows:

My knowledge of the terms of the settlement described in this interrogatory between Ann Hitchcock and the agent of the president, directors, and company of the Bank of the United States, is derived from information obtained from James Erwin, the attorney of the said Ann Hitchcock in the said settlement, from Herman Cope, and of the officers of the said bank, and from S. Griffitts Fisher, its attorney, at Mobile, and from documents handed me, connected with said settlement, after the same was made in April, 1840, when I became agent for the said bank at Mobile.

The controversy originated from a large debt due by the late Henry Hitchcock, husband of the said Ann Hitchcock, to the said the president, directors, and company of the Bank of the United States, for which debt the said bank held his bond and mortgage, which mortgage embraced also her relinquishment of dower. I do not recollect to what length this controversy had proceeded in the lifetime of the said Henry Hitchcock. The evidence of the extent of control undertaken by Ann Hitchcock over the said property was furnished to me by leases signed by her as executrix of the late Henry Hitchcock, deceased, for nearly every piece of the said property. One of the said leases to A. M. Carr I have now in my possession; the other leases referred to by me are of the same character, and are similarly signed by the said Ann Hitchcock, as executrix, and are similarly assigned to Joseph Cowperhwaite, Thomas Dunlap, and Herman Cope, who were trustees for the president, directors, and company of the Bank of the United States, to the number of seventy or more, embracing, as before stated, the property at that time conveyed by her to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, who were trustees for the said the president, directors, and company of the Bank of the United States, for which she had executed leases at that time. I have not in my possession here any other papers connected with this controversy. The handwriting of the said Ann Hitchcock is well known to me; the signatures to the said leases and to the assignments of the same, are in her handwriting. All my knowledge of the terms of this settlement is derived from James Erwin, Herman Cope, S. Griffitts Fisher, and from deeds which I have seen.

3. To the third interrogatory on the part of the defendants he answers as follows:

The only paper that I have in my possession, or which I can produce in answer to this interrogatory, is the lease and assignment thereof, referred to in my answer to the next preceding interrogatory, and which is hereto attached and marked A, and which lease came to my possession on this occasion by having been sent to me from Mobile, at my request. The most of the residue of the papers referred to in my answer to the next preceding interrogatory are believed by me to be in the possession of Sidney Smith, esq'r, the present agent of the defendants, at Mobile, to whom, with the lease now attached hereto, they were handed by me in June, 1847, when I ceased to be the agent of the said defendants.

4. To the fourth interrogatory on the part of the defendants he answers as follows:

I know no such matter or thing, except that I became the agent of the said the president, directors, and company of the Bank of the United States at Mobile, in April, 1840, and that by virtue of the assignments of the said leases and of the conveyance above stated, made by the said Ann Hitchcock, I first as agent for the trustees of the said the president, directors, and company of the Bank of the United States, and afterwards as agent for the said assignees of that bank, took upon myself the management and control of the property described in those leases, and was never interrupted by the said Ann Hitchcock therein, and that she never disputed the same in any manner, or claimed any right in the said property until the filing of this present bill.

Cross interrogatories.

1. To the first interrogatory on the part of the complainant he answers as follows:

"A settlement was made by Herman Cope and S Griffitts Fisher, on the part of the said the president, directors, and company of the Bank of the United States, and James Erwin, attorney for the said Ann Hitchcock, as I was informed by them; I do not know of any act done by the said Anne Hitchcock, except signing the deed for the property in question, the leases for the same before referred to by me, and the assignments of the said leases, her signature being known to me; I do not know if Mr. Cope ever saw Mrs. Hitchcock during his visit to Mobile; I never had any conversation with Mrs. Hitchcock upon the subject; I knew that she knew the terms of this settlement, from the fact that she executed a deed and assigned the leases, (previously made by her,) in pursuance of the *the* terms of the settlement which was thereby carried out, and of the character of which she must have been fully aware; I do not know of any such power in writing or otherwise to James Erwin, except that he stated to me, after the settlement was made, when I became the agent of the said the president, directors, and company of the Bank of the United States, that he had had such power; and I was further convinced of the existence of the same by the fact that she confirmed the settlement he had made, and carried it out by her deed, and by her assignments of the leases as before mentioned by me."

HINDMAN BARNEY.

B. GERHARD,
WM. L. SCHAFFER,
Commissioners.

A.

This indenture, made this first day of November, A. D. one thousand eight hundred and thirty-nine, between Anne Hitchcock, executrix, of the city of Mobile, and State of Alabama, of the first part, and

A. M. Carr, of said city and State, of the second part, witnesseth, that the said party of the first part, for and in consideration of the rents, provisoes, and agreements herein and by these presents mentioned, reserved and contained, and which on the part of the said party of the second part, his heirs, executors, administrators, and assigns, are to be paid, observed, done, and performed. And the said party of the first part hath leased and to farm let, and by these presents doth lease and to farm let, unto the said party of the second part, his heirs, executors, administrators, and assigns, all that certain cotton shed, with the two stores attached to the sheds, usually used as cotton presses, exclusive of a portion of one of the yards on which the late Judge Hitchcock has erected offices, with 10 or 12 feet yard-room attached to them; and the south wing on Church street, now rented to Mr. Spaulding, and used as a stable. The said premises leased are bounded on the north by the alley, in the rear of Hitchcock's row, on the south by Spaulding's stables and Church street, on the east by Water street, and on the west by said offices; to have and to hold the above described premises, with the appurtenances to the same belonging, to him, the said party of the second part, his heirs, executors, administrators, and assigns, for the term of one year, to wit, from the first day of November, A. D. one thousand eight hundred and thirty-nine, yielding and paying therefor, to the said party of the first part, her heirs, executors, and administrators, and assigns, the annual rent of three thousand dollars, being in the manner following: on the first days of February, May, and August thereafter succeeding, the sum of one thousand dollars on each of the aforesaid days; providing, always, nevertheless, that if it shall happen that either of the said instalments, or any part thereof, shall be behind and unpaid for the space of three days, next after either of the said days of payment, (as herein specified,) or if the said party of the second part, his heirs, executors, administrators, or assigns, or any and every one claiming or occupying under him, shall permit the said premises hereby leased, or any part thereof, without the consent of the said party of the first part, her heirs, executors, administrators, or assigns, first had and obtained in writing, under his or their hands for that purpose, then, and in either of the said cases, it shall and may be lawful to and for the said party of the first part, her heirs, executors, administrators, and assigns, unto the premises hereby leased, or any and every part thereof, in the name of the whole, to re-enter, and the same to have again, receive, repossess, and enjoy, as in her first and former estate or estates; and he, the said party of the second part, his heirs, executors, administrators, and assigns, and all and every other the occupier or occupiers of the said demised premises, from thence utterly to expel, remove, and put out; any thing in these presents contained to the contrary thereof in any wise notwithstanding. And the said party of the second part, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said party of the first part, her heirs, executors, administrators, and assigns, in the manner following: that he, the said party of the second part, his heirs, executors, administrators, and

assigns, shall and will well and truly pay, or cause to be paid, unto the said party of the first part, her heirs, executors, administrators, or assigns, the said annual rent of three thousand dollars, in the manner herein before limited and appointed, according to the reservations thereof, and the true intent and meaning of these presents; and the said described premises, with the improvements and alterations, with their appurtenances, (the determination of time only excepted,) at the end of the said period of this lease, (or sooner determination of this present demise,) unto the said party of the first part, her heirs, executors, administrators, or assigns, shall and will, quietly and peaceably, leave and surrender, and yield up the same, in as good order and condition as reasonable wear and use thereof will permit.

In witness whereof the parties to these presents have hereunto set their hands and affixed their seals the day and date above written.

ANNE HITCHCOCK, *Executrix*, [L. S.]
ALEX'R M. CARR. [L. S.]

In presence of—
WILLIAM HURTER,
W. EDMOND.

For value received, I hereby assign, transfer, and set over, to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, all the right, title, interest, and estate, property, claim, and demand of Henry Hitchcock, dec'd, and all my right, title, interest, estate, property, claim, and demand, of, to, in, or out of the within deed of lease, between the said Henry Hitchcock or myself, as his executrix, and A. M. Carr, dated the first day of Nov'r, 1839.

Witness my hand and seal, this 8th day of February, 1840.

ANNE HITCHCOCK, *Executrix*. [SEAL.]

Test: A. ERWIN,
R. L. ERWIN.

This is the paper, exhibit, or document referred to by Hindman Barney in his examination, as the paper marked "A."

HINDMAN BARNEY,
B. GERHARD,
W. L. SCHAFFER,
Commissioners.

Testimony of Wm. Brooks.

THE STATE OF ALABAMA, *Mobile county.*

ANNE HITCHCOCK
vs.
JAMES DUNDAS et al.

Circuit court of the U. S., southern district of Ala.

Interrogatories to Wm. Brooks.

1. How long have you been employed as recorder of deeds in the

clerk's office of the county court of Mobile; have you had the charge of that portion of the business of the office during that time?

2. Will you look at the certificate of Charles A. Marston to the deed of Henry Hitchcock to Cowperthwaite, Dunlap, and Cope, a copy of which certificate is hereto attached; is that a common and usual form of certifying the acknowledgments by the officers employed to perform that duty in this county?

3. Will you state particularly if the use of the words found in that certificate, as follows, "that she signed, sealed, and delivered the said indenture of mortgage, freely and of her own accord, without any fear, threats, or compulsion of her said husband," are the words most commonly employed in taking the acknowledgments of wives to deeds of mortgage; will you state what other form is more usual, if any? State the names of the officers who have employed this form, and the length of time it has been of use.

4. Will you state if, in the certificates of acknowledgments of relinquishments of dower, the officer taking the relinquishment designates the instrument acknowledged as a release of dower, or whether he designates it by the name of the deed upon which it is written, and to which it is attached? State the usual form employed in the office at Mobile of deeds of mortgage with certificates of relinquishment thereon. Attach a copy of the deed, with the deed of relinquishment, and the certificate thereon, to your answers hereto.

How long has this form been in use?

J. A. CAMPBELL,
For plaintiffs.

Answer of Wm. Brooks.

1. I have had the principal charge of that portion of the business of the office of the clerk of the county court for near twelve years.

2. The form employed is a form common and much used by the officers who take acknowledgments of deeds, as appears from the examination of the records.

3. The use of the words specified in this interrogatory is the most usual form employed in this county; the substitution of the words "freely, and of her own accord," for the words used in the statute "as her voluntary act and deed, freely," is almost universal; at least four-fifths of the officers employ this forms, as appears from the records; it appears in the usual printed form; it has been employed for nearly the last twenty years, for which time my examination has been directed.

4. In the description of the paper acknowledged the form is various; in most cases, the certificate embraces the acknowledgment of the husband as well as the examination of the wife; the certificate recites that the husband acknowledges the execution of the foregoing deed or mortgage to be his act and deed, and the wife acknowledges that she signed, sealed, and delivered the said deed freely, &c., or, she signed,

sealed, and delivered the same freely; or she signed, sealed, and delivered the said indenture of mortgage, or deed of mortgage, freely. In books L, O, R, and V, being from 1831 to 1838, there are upwards of fifty in which the wife acknowledges her relinquishment on the mortgage as simply her deed; in the same books she acknowledges that she signed, sealed, and delivered the deed or indenture of mortgage; and in a like manner her acknowledgment that she signed, sealed, and delivered the same. I have found only six or eight cases in which the terms release or relinquishment of dower appears.

WILLIAM BROOKS.

And I, Anne Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar, to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish by these presents, all my right and title of dower in and to the above described premises to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, and to the heirs, executors, and assigns of such survivor forever.

Witness my hand and seal the fourteenth day of July, one thousand eight hundred and thirty-eight.

ANN HITCHCOCK, [L. S.]

Attest: CHARLES A. MARSTON.

THE STATE OF ALABAMA,
Mobile county.

Personally appeared before me, Charles A. Marston, notary public in and for said county, the above named H. Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned. And also [appeared] personally before me, Charles A. Marston, Ann Hitchcock, wife of the said H. Hitchcock, who being examined privately, apart from her said husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely and of her own accord, and without any fear, threats, or compulsion of her said husband.

Given under my hand and seal notarial, the fourteenth day of July, A. D. 1838.

CHARLES A. MARSTON.

Received by consent; subject to exceptions as to competency.

Lease of H. Hitchcock to G. H. Spaulding, and assignment of same by Ann Hitchcock.

This indenture, made this 28th day of August, A. D. one thousand eight hundred and thirty-eight, between Henry Hitchcock, of the city of Mobile, and State of Alabama, of the first part, and George H.

Spaulding, of the second part, witnesseth: That the said party of the first part, for and in consideration of the rents, provisoes, and agreements herein and by these presents mentioned, reserved, and contained, and which on the part of the said party of the second part, his heirs, executors, administrators, and assigns, are to be paid, observed, done, and performed; the said party of the first part hath leased and to farm let, and by these presents doth lease and to farm let, unto the said party of the second part, his heirs, executors, administrators, and assigns, the house and lot on Royal street, now occupied by Wm. Edmond; the house and lot adjoining, at the corner of Royal and Church streets; and also the brick cotton shed on the north side of Church street, extending to Water street, 165 feet long by 35 feet wide, without the privilege of the yard. To have and to hold the above described premises, with the appurtenances to the same belonging, to him, the said party of the second part, his heirs, executors, administrators, and assigns, for the term of three years, to wit, from the first day of November, A. D. one thousand eight hundred and thirty-eight, yielding and paying therefor, to the said part of the first part, his heirs, executors, administrators, and assigns, the annual rent of two thousand five hundred dollars, being in the manner following: In quarterly payments of six hundred and twenty-five dollars each, on the first days of February, May, August, and November, in each year; the first payment to commence on the first day of February next; and as a further consideration, the said party of the second part hereby agrees to *to* erect, at his own expense, the following improvements, to wit, a brick wall, commencing at the south corner of the house occupied by said Edmunds, and extending to Church street, to be twenty-one feet six inches high; the first twelve feet to be two bricks thick, and the residue one and a-half brick thick. Also a brick wall on Church street, from the corner of Royal street, 2 bricks thick, 12 feet high, extending to the present shed; together with a slate roof on Royal street, front extending back to the house occupied by Miller; and on Church street a slate roof to within 10 feet of said house, and to have proper copper gutters and conductors. Also to fit up the present shed on Church street, suitable for a livery stable, and to hold eighty horses; the whole premises to be well done, and to be delivered in good repair at the expiration of the said lease, ordinary wear and tear excepted: Providing always, nevertheless, that if it shall happen that either of the said instalments, or any part thereof, shall be behind and unpaid for the space of three days next after either of the said days of payment, (as herein specified,) or if the said party of the second part, his heirs, executors, administrators, or assigns, or any and every one claiming or occupying under them, shall permit the said premises hereby leased, or any part thereof, without the consent of the said party of the first part, his heirs, executors, administrators, or assigns, first had and obtained in writing under his or their hands for that purpose, then, and in either of the said cases, it shall and may be lawful to and for the said party of the first part, his heirs, executors, administrators, and assigns, unto the premises hereby leased, or any and

every part thereof, in the name of the whole, to re-enter, and the same to have again, receive, repossess, and enjoy, as in his first and former estate or estates; and he, the said party of the second part, his heirs, executors, administrators, and assigns, and all and every other the occupier or occupiers of the said demised premises, from thence utterly to expel, remove, and put out, anything in these presents contained to the contrary thereof in anywise notwithstanding; and the said party of the second part, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said party of the first part, his heirs, executors, administrators, and assigns, in the manner following: That he, the said party of the second part, his heirs, executors, administrators, and assigns, shall and will well and truly pay, or cause to be paid, unto the said party of the first part, his heirs, executors, administrators, or assigns, the said annual rent of two thousand dollars, in the manner hereinbefore limited and appointed, according to the reservations thereof, and the true intent and meaning of these presents; and the said described premises, with the improvements and alterations, with their appurtenances, (the determination of time only excepted,) at the end of the said period of this lease, (or sooner determination of this present demise,) unto the said party of the first part, his heirs, executors, administrators, or assigns, shall and will, quietly and peaceably, leave and surrender, and yield up the same in as good order and condition as reasonable wear and use thereof will permit.

In witness whereof the parties to these presents have hereunto set their hands and affixed their seals, the day and date above written.

H. HITCHCOCK, [L. S.]
GEORGE H. SPAULDING. [L. S.]

In presence of—
W. L. WALLER.

For value received I hereby assign, transfer, and set over, to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, all the right, title, interest, estate, property, claim, and demand, of Henry Hitchcock, deceased, and all my right, *my right* title, interest, estate, property, claim, and demand, of, in, to, or out of the within deed of lease between the said Henry Hitchcock or myself, as his executrix, and George H. Spaulding, dated the 28th of August, 1838.

Witness my hand and seal this 8th day February, 1840.

ANNE HITCHCOCK, *Executrix.* [SEAL.]

Test:
A. ERWIN,
R. L. ERWIN.

Lease of A. Hitchcock to J. C. Smith & Co., and her assignment of the same.

This indenture, made this first day of November, A. D. one thousand eight hundred and thirty-nine, between Anne Hitchcock, execu-

trix, of the city of Mobile and State of Alabama, of the first part, and J. C. Smith & Co., of said city and State, of the second part, witnesseth: That the said party of the first part, for and in consideration of the rents, provisoes, and agreements herein and by these presents mentioned, reserved, and contained, and which, on the part of the said party of the second part, their heirs, executors, administrators, and assigns, are to be paid, observed, done, and performed; and the said party of the first part hath leased and to farm let, and by these presents doth lease and to farm let, unto the said party of the second part, their heirs, executors, administrators, and assigns, all of those two certain stores situated on the first stories of the fourth and fifth brick tenements (numbering westwardly from Water street) in "Hitchcock's row," (so called,) lying between Water and Royal streets, on the south side of Government street. Also all that certain dwelling-house situated in said "Hitchcock's row," it being the (6,) No. six in said row, numbering westwardly from Water street, together with the kitchens and yards in rear of the same.

To have and to hold the above described premises, with the appurtenances to the same belonging, to them, the said party of the second part, their heirs, executors, administrators, and assigns, for the term of one year, to wit, from the first day of November, A. D. one thousand eight hundred and thirty-nine, yielding and paying therefor, to the said party of the first part, their heirs, executors, administrators, and assigns, the annual rent of nineteen hundred dollars, being in the manner following: On the first days of February, May, August, and November thereafter succeeding, the sum of four hundred and seventy-five dollars on each of the aforesaid days; providing, always, nevertheless, that if it shall happen that either of the said instalments, or any part thereof, shall be behind and unpaid for the space of three days, next after either of the said days of payment, (as herein specified;) or if the said party of the second part, their heirs, executors, administrators, or assigns, or any and every one claiming or occupying under them, shall permit the said premises hereby leased, or any part thereof, without the consent of the said party of the first part, her heirs, executors, administrators, or assigns, first had and obtained in writing, under his or their hands for that purpose, then and in either of the said cases it shall and may be lawful to and for the said party of the first part, her heirs, executors, administrators, and assigns, unto the premises hereby leased, or any and every part thereof, in the name of the whole, to re-enter and the same to have again, receive, repossess, and enjoy, as in her first and former estate or estates; and they, the said party of the second part, their heirs, executors, administrators, and assigns, and all and every other the occupier or occupiers of the said demised premises, from thence utterly to expel, remove, and put out, any thing in these presents contained to the contrary thereof in any wise notwithstanding. And the said party of the second part, their heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said party of the first part, her heirs, executors, administrators, and assigns,

in the manner following: that they, the said party of the second part, their heirs, executors, administrators, and assigns, shall and will well and truly pay, or cause to be paid, unto the said party of the first part, her heirs, executors, administrators, or assigns, the said annual rent of nineteen hundred dollars, in the manner hereinbefore limited and appointed, according to the reservations thereof, and the true intent and meaning of these presents; and the said described premises, with the improvements and alterations, with their appurtenances, (the determination of time only, excepted,) at the end of the said period of this lease, (or sooner determination of this present demise,) unto the said party of the first part, her heirs, executors, administrators, or assigns, shall and will, quietly and peaceably, leave and surrender, and yield up the same, in as good order and condition as reasonable wear and use thereof will permit.

In witness whereof the parties to these presents have hereunto set their hands and affixed their seals the day and date above written.

ANNE HITCHCOCK, *Executrix*, [SEAL.]
J. C. SMITH & CO. [SEAL.]

In presence of—

For value received I hereby assign, transfer, and set over to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, all the right, title, interest, and estate, property, claim, and demand of Henry Hitchcock, dec'd, and all my right, title, interest, estate, property, claim, and demand, of, to, in, or out of the within deed of lease between the said Henry Hitchcock or myself, as his executrix, and J. C. Smith & Co., dated the first of November, 1839.

Witness my hand and seal, this 8th day of February, 1840.

ANNE HITCHCOCK, *Executrix*. [SEAL.]

Test: A. ERWIN,
R. L. ERWIN.

There were eighteen other leases offered in evidence similar to the above, and having the same transfer and assignment by Anne Hitchcock on the backs of said leases, which, by agreement of parties are not here copied at length, but described as follows:

First. A lease from Anne Hitchcock to Sarah Conway and Drury Thompson, of the following described property, to wit, a certain dwelling-house, situated in Hitchcock's row, so called, on the south side of Government street, between Royal and Water streets, excepting the room in the first story of said dwelling-house; the said dwelling-house being the fourth building in said row, numbering westwardly from Water street, for the term of one year, to wit, from the first day of November, A. D. one thousand eight hundred and twenty-nine, until the first day of November, A. D. one thousand eight hundred and forty, for the sum of seven hundred and fifty dollars, payable as follows: On the first days of February, May, August, and November

thereafter succeeding, the sum of one hundred and eighty-seven and $\frac{50}{100}$ dollars on each of the aforesaid days.

Second. A lease from Ann Hitchcock to Thomas Henry of all that certain store in Hitchcock's row, so called, situated on the *on the* south side of Government street, between Water and Royal streets; it being the first story of the tenement occupied in the upper stores by Aaron George, and sixth tenement numbering westwardly from Water street in said row, for the term of one year, to wit, from the first November, A. D. one thousand eight hundred and thirty-nine, for the sum of seven hundred dollars, payable on the first days of February, May, August, and November thereafter *secondary*, the sum of one hundred and seventy-five dollars on each of the aforesaid days.

Third. A Lease from Ann Hitchcock to Polhemus and Moore, of all that certain dwelling-house, excepting the store in the first story of the same, which is rented by Pickering and Maclin, situated in Hitchcock's row, so called, on the south side of Government street, between Water and Royal streets, it being the third tenement in said row west from Water street, for the term of one year, to wit, from the first day of November, A. D. one thousand eight hundred and thirty-nine, for the sum of eight hundred dollars, payable on the first days of February, May, August, and November thereafter succeeding, the sum of two hundred dollars each of the aforesaid days.

Fourth. A lease from Ann Hitchcock to E. A. James and Geo. H. Fry, of all of the first and second tenements, situated on the east end of Hitchcock's row, so called, lying on the south side of Government street, between Royal and Water streets, (excepting the rooms on the first stores of said tenements,) which are rented by the said party of the first part to E. Robinson and G. Nethercot, the present tenants, for the sum of fifteen hundred dollars, payable on the first *on the first* day of February, May, August, and November thereafter succeeding, the sum of three hundred and seventy-five dollars on each of the aforesaid days.

Fifth. A lease from Ann Hitchcock to Ketchum & Rawle, all of the two offices situated in the second story of the brick building directly west of and adjoining the store of Messrs. Roberson, Beale & Co., lying on the south side of St. Francis street, between Water and Commerce streets, for the term of one year, from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of three hundred dollars, being in the following manner, on the first days of May, August, and November thereafter succeeding, the sum of seventy-five dollars on each of the aforesaid days.

Sixth. A lease from Ann Hitchcock to Hora and McCall, to all of the first story, together with the front office on the second story, and the third and fourth stories of the back store situated on the south side of St. Francis street, next and adjoining the premises of Charles Barney, esq., between Commerce and Water streets, for the term of one year, to wit, from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of fifteen hundred dollars; payment as follows, on the first days of February, May, August, and No.

vember thereafter succeeding, the sum of three hundred and seventy-five dollars each of the aforesaid days.

Seventh. A lease from Ann Hitchcock to John King, to all that certain dwelling-house situated on the south side of Government street, between Water and Royal streets, (except the two rooms in the first story of said dwelling-house, which are rented by the said executrix to John L. Bostwick the same dwelling-house being second east of Government street hotel, for the term of one year, to wit, from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of four hundred dollars; payment in the following manner, on the first days of February, May, August, and November thereafter succeeding, the sum of one hundred dollars on each aforesaid day.

Eighth. A lease from Anne Hitchcock to T. Winn, to all that certain store situated in Hitchcock's row, (so called,) on the south side of Government street, between Water and Royal streets, it being the first of a tenement occupied and numbering westwardly from Water street seven, (No. 7,) in the aforesaid Hitchcock's row, for the term of one year, to wit, from the first of November, one thousand eight hundred and thirty-nine, for the sum of five hundred dollars; payment as follows, on the first of February, May, August, and November thereafter succeeding, the sum of one hundred and twenty-five dollars on each of the aforesaid days.

Ninth. A blank lease to Sherman and Chambers.

Tenth. A lease from Ann Hitchcock to Charles B. Warren, to all that certain brick tenement, together with the kitchen and yard in the rear of the same, (excepting) the store in [the] first story of said tenement, which the said party of the first part has rented to Winn; the said tenement situated in Hitchcock's row, (so called,) on the south side of Government street, between Water and Royal streets, for one year, to wit, from the first of November, one thousand eight hundred and thirty-nine, for the sum of eight hundred dollars, to be paid as follows, on the first of February, May, August, and November thereafter succeeding, the sum of two hundred dollars on each of the aforesaid days.

Eleventh. A lease from Anne Hitchcock to John L. Bostwick, to all that certain room designed for store in the second brick tenement, being eastwardly from the unfinished hotel, situated on the northeast corner of Royal and Government streets, and adjoining on the east a brick building owned by Philip M. Closkey, esquire, for the term of one year, to wit, from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of six hundred dollars, to be paid as follows, on the first of February, May, August, and November thereafter succeeding, the sum of one hundred and fifty dollars on each of the aforesaid days.

Twelfth. A lease from Anne Hitchcock to D. McCullough, to all that certain dwelling-house, together with the kitchen, stable, and yard, situated on the northwest corner of Jackson and St. Louis streets, being the same residence as occupied by the Revd. William T.

Hamilton during the past year, for one year, to wit, from the first November, one thousand eight hundred and thirty-nine, A. D. for the sum of eleven hundred dollars, to be paid as follows, on the first day of February, May, August, and November thereafter succeeding, the sum of two hundred and seventy-five dollars [on] each of the aforesaid days.

Thirteenth. A lease from Anne Hitchcock, executrix, to Mifflin and Longfield, to all that certain *back* tenement, together with kitchen and yard in the rear of the same, (excepting) the store on the first story of said tenement, which the said party of the first part have rented to R. North & Co.; the said tenement situated on Hitchcock's row, so called, on the south side of Government street, between Water and Royal streets, and numbering *and numbering* west from Water street No. 8, (eight,) in the said row, for the term of one year, to wit, from the first of November, one thousand eight hundred and thirty-nine, for the sum of seven hundred dollars, to be paid as follows, on the first days of February, May, August, and November, the sum of one hundred and seventy-five dollars on each of the aforesaid days.

Fourteenth. A lease from Anne Hitchcock, executrix, to Brenden & Leavin, to all that certain office in the rear of the second story of the brick building situated on the south side of St. Francis street, between Commerce and Water streets, directly west, adjoining the premises of Charles Barry, esq., for the term of one year, to wit, from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of one hundred and fifty dollars, to be paid as follows, on the first days of February, May, August, and November thereafter succeeding, the sum of thirty-seven $\frac{50}{100}$ dollars on each of the aforesaid days.

Fifteenth. A lease from Anne Hitchcock, executrix, to W. H. Pratt, to all that certain brick house, situated on the north side of Government street, directly east and adjoining the house occupied by Wm. Ledyard, esq., for the term of one year from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of one thousand dollars, to be paid as follows, on the first days of February, May, August, and November thereafter succeeding, the sum of two hundred and fifty dollars on each of the aforesaid days.

Sixteenth. A lease from Mrs. Anne Hitchcock, executrix, to Mrs. Worsham, to all that certain *back* tenement, together with the kitchen and yard of the rear of the tenement, excepting the store of the first story of said tenement, which said executrix has rented to A. Gage, situated on the south side of Government street, in Hitchcock's row, so called, between Water and Royal streets, it being the fifth tenement numbering westwardly from Water street, for the term of one year, to wit, from the first of November, A. D. 1840, for the sum of eight hundred dollars, to be paid as follows, on the first days of February, May, August, and November thereafter succeeding, the sum of two hundred dollars on each of the aforesaid days.

Seventeenth. A lease from Anne Hitchcock, executrix, to Mrs. Curry and Drury Thompson, of all that certain dwelling-house situated in

Hitchcock's row, so called, on the south side of Government street between Water and Royal streets, excepting the room in the first story of said dwelling, which is rented by the said party of the first [part,] to J. C. Smith & Co., the said dwelling being the 4th building in said row, numbering westwardly from Water street, for the term of one year, to wit, from the first of November, A. D. one thousand eight hundred and forty, to be paid as follows, on the first days of February, May, August, and November thereafter succeeding, the sum of one hundred and eighty-seven $\frac{50}{100}$ dollars, on each of the aforesaid days.

Eighteenth. A lease from Anne Hitchcock, executrix, to J. C. Smith & Co., to all that certain property, two stores situated in the first story of the fourth and fifth tenements, numbering westward from Water street, in Hitchcock's row; also all that certain dwelling-house, situated in Hitchcock's row, it being the 6th, numbering from Water street together with the kitchen and yard in rear of said building, for the term of one year, to wit, from the first of November, A. D. one thousand eight hundred and thirty-nine, for the sum of nineteen hundred dollars, to be paid as follows, on the first days of February, May, August, and November, thereafter succeeding, the sum of four hundred and seventy-five dollars on each of the aforesaid days.

Agreement of the parties.

Documentary evidence to be admitted on the [part of the] defendants in the two cases in which Anne Hitchcock is plaintiff, and James Dundas, Mordecai Lewis, and others, are defendants, pending in the circuit court of the United States, for the southern district of Alabama.

1st. Mortgage of Henry Hitchcock and Anne, his wife, to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, dated 14th July, 1838, with the bond shewing the date.

2d. Leases of Henry Hitchcock to Hurtel and Mansony, dated 10th October, 1838, with Anne Hitchcock's assignment thereon. These leases are of the property known as the Cotton Press. The assignment of Center & Co., also to be read.

3d. The conveyances from Cowperthwaite, Dunlap, and Cope to the defendants of all interest in the said premises, or copies from the record of these conveyances may be submitted in lieu of the originals.

4th. A copy from the record of the release of Herman Cope to Anne Hitchcock, at the date of the settlement between the said Anne and the said Cowperthwaite, Dunlap, and Cope.

5th. Copies of the deeds executed by James Erwin and Anne Hitchcock at the date of the settlement between the said parties in 1840, and which are described in the answers of the defendants.

6th. That the evidence taken in one of the causes shall apply to both, in so far as the same may be competent.

J. A. CAMPBELL, *for Defts.*

October 13, 1848.

The above is agreed to, and the complainants will be at liberty to produce any part of the record and opinions of the court of the former suit between the bank and Hitchcock, respt., as far as competent.

Mobile, 25th October, 1848.

STEWART & EASTON,
Sols. for complainant.

Filed April 16th, 1849.

JOHN FITTS, *Clerk.*

And afterwards the following opinion of the supreme court of the State of Alabama was offered and read by the counsel for the complainant, to wit:

Ormond, J.—Before proceeding to the consideration of the merits of the case, we will first examine the objections to the parties. It is urged that it is uncertain who are the complainants. The bill is filed by Cowperthwaite, Dunlap, and Cope, to whom, acting for and on behalf of the bank, the bond and mortgage were executed. The next bill in order is an amended and supplemental bill, filed by the complainants, in which they disclose the fact that they are mere trustees of the bank, and pray that the bank may be made a party. Another amended and supplemental bill was filed, reciting at length the two former bills, and among other things disclosing the fact that Cowperthwaite, Dunlap, and Cope had assigned all their interest in the mortgaged premises to James Dundas and others, and pray that the assignees may be admitted complainants with the bank, and that the names of Cowperthwaite, Dunlap, and Cope be stricken out of the bill.

It cannot be doubted that all these persons, who at different times make their appearance in the cause, constitute in law but one person. Cowperthwaite, Dunlap, and Cope, who filed the first bill, are mere trustees, but did not disclose their cestui que trust.

In the second bill this is done, but certainly this cannot prejudice the rights of any, or create any difficulty.

Afterwards, when the bank went into liquidation, the fact is brought to the notice of the court, and the names of the assignees spread upon the records as parties complainant. This was undoubtedly correct.

It does not appear from the record whether Cowperthwaite and others were dismissed as they prayed to be. They, therefore, remained as nominal parties, having ceased to have any interest in the matter in litigation.

It is supposed they are placed in such an attitude that they may be considered as parties to the bill or not as may suit their convenience. This is undoubtedly a mistake. They are parties to the bill, and as such estopped from denying any fact there alleged by them.

This is not the case of a party who has no interest joining in a bill with one who has; the interest of all these parties is the same; the bank is the principal, the others are trustees in whom the title is vested. It is, in

fact, merely, the case of cestui que trust and trustee uniting in the same bill; and although in this case the bank was not a necessary, it was certainly a proper, party to the bill.

Proceeding to the examination of the merits, we will in the first instance endeavor to ascertain the place where the contract was made. Henry Hitchcock, resident in Mobile, goes to Philadelphia, and makes the following proposition to the Bank of the United States:

PHILADELPHIA, *May 25th*, 1838.

SIR: I, the undersigned, am indebted to the president, directors, and company of the Bank of the United States in the following sums, independently of my liability for others not now brought into view, and for the payment of which sums other satisfactory arrangements will be made, viz: (Here follows a list of the debts, amounting in all to $520,530 96.)

To this sum it is proposed that the bank add in money, in Mobile, for the purpose of improving and rendering productive the improved portion of the real estate hereinafter proposed by me to be mortgaged to the bank to secure the payment of the above debt. The sum to be advanced, and the prior liens upon it hereinafter mentioned, with the interest on the whole, at the rate of eight per cent., to be advanced as the improvement advances, and the payments are required.

[Here follows a list of the liens which existed upon the property proposed to be mortgaged.]

To secure the payment of the above sum of $620,530.96 after payment of the existing liens above named, with interest on the whole debt, as above, and all the advances which have or shall be made by the said bank on account thereof, at the rate of eight per cent. per annum at the following periods of time, and in the following proportions, in the city of New York, that is to say, two-fifths thereof, of principal and interest, to 1st March, 1838, (as above stated) 1st March, 1839; one-fifth thereof, (as above,) 1st March, 1840; one-fifth, thereof, 1st March, 1841; one-fifth do., 1st March, 1842. The whole to be paid, as above, in the city of New York, with the whole amount of the above debt and incumbrances unpaid, to be paid half yearly, in New York, on the first September, 1838, and on the first day of March and September in the years 1839, 1840, 1841, and 1842, until the whole is paid; and I do hereby promise to make and execute, in due form of law, to the said president, directors, and company of the Bank of the United States, their successors and assigns, a full and sufficient deed of mortgage of all the following described real estate, free from all incumbrances, except as herein specified:

(Here follows a list of the property, with the value, amounting in all to $966,200.00.)

And I hereby also promise, contract, and agree, to and with the said president, directors, and company of the Bank of the United States, faithfully to invest the whole of the said sum of one hundred thousand dollars, herein proposed to be advanced to me by the said bank for that purpose, in the substantial and beneficial improvement of such portion of

said mortgaged real estate as may most require it to make it productive) to be laid out and expended under the supervision and approbation of George Poe, as agent of the bank at Mobile, previously obtained, who shall also be appointed by me, by a proper instrument in writing, the sole receiver of all the rents and profits of the said real estate to be mortgaged to the said bank, until the debt is fully paid; to be paid by him as received, half yearly, on the first of March and September, of each year, to the credit of my said debt and liability as above referred to.

And I do hereby further stipulate and agree, that on my failure to pay, or on the non-payment of any one of the said annual instalments of principal, or the interest half yearly, as the same shall become due and payable as herein provided for, the entire debt, with the interest that shall be then due thereon, shall be deemed and considered as all due presently and on demand. And the said president, &c., shall thereupon, and in that case, have the right and be at full liberty to proceed to foreclose their said mortgage without further delay, and sell the said mortgaged real estate in parcels as they may deem best, for cash, to the highest bidder, and apply the proceeds towards the payment of the said mortgage claim. And if the proceeds of the said real estate, after the payment of the existing liens, with all costs and legal charges against it, shall not be sufficient to discharge and satisfy the said claims in full, I hereby promise and contract to pay to the said president, &c., the deficiency. The surplus, if any, after discharging said claims, to be paid to me, &c.

HENRY HITCHCOCK.

NICHOLAS BIDDLE, esq., *President, &c.*

Upon which proposition the bank made the following order:

BANK OF THE UNITED STATES, *May 25th*, 1838.

The above and foregoing proposition of Henry Hitchcock has been agreed to and accepted by the president, directors, and company of the Bank of the United States, and their agent at Mobile, George Poe, jr., esquire, will be authorized and instructed to carry it into immediate effect on the part of the bank.

HERMAN COPE, *3d cashier.*

The agreement was consummated in Mobile, on the 14th July, 1838, by the execution of the bond and mortgage contemplated by the proposition of Mr. Hitchcock. The sum stipulated to be advanced, $100,000, was paid to him at different periods between the 14th of July and the 24th November of the same year, and was expended in the improvement of the mortgaged premises.

By the proposition made in Philadelphia, Mr. Hitchcock distinctly admits his indebtedness to the bank; where this debt was created does not appear, and it is therefore fair to assume that it was created in Mobile.

Be that as it may, he admits his indebtedness, and proposes an ad-

distant advance to him in Mobile, and in consideration thereof agrees to execute a bond and mortgage on certain property in Mobile. This proposition, though acceded to by the bank, is certainly not the contract of the parties; it clearly contemplates the execution of the contract there proposed in Mobile. The fact that Mr. Hitchcock was in Philadelphia when the proposition was made has no tendency to show that the contract was there executed. It is in effect precisely the same as if the proposition had been made by letter from Mobile.

It is, in fact, a proposition to make a future contract in Mobile, which the bank acceded to, and promised to direct their agent to execute. Both parties so considered it. Mr. Hitchcock lived in Mobile; there the property to be mortgaged was situated; there the money was to be received; there the mortgage was to be made; in a word, there the proposition was to be carried into effect by the execution of the contract.

On the 14th July, 1838, in Mobile, Mr. Hitchcock, pursuant to his proposition, executed to Messrs. Cowperthwaite, Dunlap, and Cope, his bond, admitting his indebtedness to the bank in the sum of $620,530 96, with interest at the rate of 8 per cent. per annum, from the 1st of March, 1838. The interest to be paid semi-annually, and the principal in four annual instalments in the city of New York. On the same day he executed to them a mortgage on a large amount of real estate situate in Mobile, to secure the payment of the debt.

It is now insisted that this contract is void, because the bank had no power, by its charter, to make any contract reserving a higher rate of interest than 6 per cent. per annum; that it is void because it violates the laws of Alabama; and if both these propositions are incorrect, then it is void by the [law of the] State of New York, where, by terms of the contract, it was to be performed.

The law of Alabama supposed to be violated by this contract is not the general law against usury, which allows eight per cent. per annum to be reserved for the loan of money or forbearance of a debt, but it is the proviso to the act of 1818. [Toulmin's Dig., 443.] The act of 1818 authorized any rate of interest to be reserved for the loan or use of money, &c., which the parties might agree upon in writing, to which is a proviso in these words: "Provided, that nothing in this act contained shall be so construed as to make it legal for any bank to receive more than at the rate of six per cent. per annum for and upon its loans and discounts." This act was changed the succeeding year by an act forbidding more than eight per cent. per annum to be reserved on any loan of money, but without expressly repealing the former act.

In the compilation of the law subsequently made by Mr. Aiken, this proviso is incorporated with the statute law. Aik. Dig., 263, section 3; and again in Clay's Dig., 284, section 3. The argument drawn from this is, that it is a statutory declaration that no bank shall take more than at the rate of six per cent. per annum on its loans and discounts; that this prohibition must apply as well to foreign corporations, who by

comity are permitted to make contracts within our limits, as to our own banks.

It is impossible to misapprehend the intention of the proviso to the act of 1818 at the time of its enactment. At that time the Huntsville Bank was in existence, and the Tombeckbee Bank was chartered at the same session; and in the charter of both these banks there was a prohibition against reserving more than six per cent. per annum on their loans and discounts.

The proviso was then inserted from an apprehension that in the hands of a corporation the power to stipulate for any rate of interest the parties might agree on would be liable to an abuse which would not attend the same contract between individuals.

Such being the intention of the proviso, and all the banks of the State being confined by their charters to six per cent. interest, it is not easy to perceive for what purpose it was retained on the statute book after the power given to individuals to stipulate for any rate of interest was taken away, especially as the prohibition against taking more than six per cent. per annum has been repeated in the charter of every bank incorporated since that time.

Subsequent laws have been passed authorizing the banks of the State to take more than six per cent. per annum in certain cases, and neither the restriction in their charter, nor the proviso we are now considering, has ever been supposed to extend to the purchase by the bank of bills of exchange.

It would, therefore, seem perfectly clear that the proviso is a dead letter as it regards our own banks, and has been retained on the statute book without any distinct apprehension of its true intent and meaning. It is not credible that it was retained on the statute book with the design that it should operate on foreign corporations. Such was certainly not the design of its enactment; and if the legislature had subsequently conceived the intention of passing a law to operate on foreign corporations, it is inconceivable that they should have adopted this obsolete proviso to effectuate their purpose; without, therefore, entering upon the inquiry, whether this contract can be considered either a loan or discount, we cannot come to the conclusion that the transaction is forbidden by any law of this State. Is the contract void, because the money was to be paid in New York, where the statute rate of interest is seven per cent., and all contracts reserving a higher rate of interest are declared void?

This is a question of the highest possible magnitude from its intrinsic importance and the vast amount of property involved in its solution. It has been argued with an earnestness and ability commensurate with the stake. It has received from us a patient and most deliberate examination, and we will now proceed to state the results of our deliberations.

Upon this vexed question certain propositions have been generally, if not universally, admitted. Personal contracts are to have the same validity, force, and interpretation in every other country which they have in the country where they are made, provided the contract is not offensive

to the rights, morals, or public policy of the country in which it is sought to be enforced. If the parties stipulate for the performance of the contract in another country, the law of the place of performance will govern the contract. It follows as a corrollary from this, that if the rate of interest be higher at the place of performance than it is at the place of contract, the parties may stipulate for the higher rate of interest; and if the contract is silent as to the interest which is to be paid for delay, after the contract matures, the law of the place of performance will furnish the rule. (Story con. of laws, 2 ed., 252, 2 Kent's com., 4 ed., 459 to 460; Andrews vs. Pond, 13 Peters, 65.)

May the parties stipulate for the rate of interest allowed by the place of the contract, when that is higher than that of the place of performance? Upon this question, unfortunately, there is a great diversity of opinion.

The supreme court of Louisiana held the affirmative of this proposition in Depau vs. Humphries, 8 Louisiana reps., 1. That was the case of a note made in Louisiana, payable in New York, the parties stipulating for the payment of a higher rate of interest than was allowed by the usury laws of the place of payment. The case was most elaborately considered, and after a full examination of the civil and common law writers and authorities, the court determined that the contract was valid. So, also, Chancellor Walworth held the same doctrine in the case of Chapman vs. Robinson, 6 Paige, 627.

There the facts were substantially the same as in the preceding case, with the additional fact, (which also exists in this case,) that a mortgage was executed by the debtor on lands lying in New York, the place where the contract was made, though to be performed in England. See, also, to the same effect, 7 Paige, 616.

On the other hand, Judge Story, in his conflict of laws, after reviewing these decisions, maintains that a rate of interest higher than that of the place of performance cannot be stipulated for, though it be allowed at the place of contract. [Story con. of laws, 247.] Amidst this conflict of jarring opinions we must determine this question on principle, and by analogy to other known and settled rules of law.

A corrupt intention to take illegal interest is of the essence of usury. When a note is made in this State, and here payable, reserving a higher rate of interest than the law allows, the intent to commit the offence of usury is apparent upon the contract itself; if made here and payable elsewhere, such an intent may, it is true, exist, but it does not appear from the contract; and as the intention may be fair and honest, a court of justice ought not to presume it to be otherwise.

Chancellor Kent says "the general doctrine is, that the law of the place where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on lands in another State, unless there are circumstances to show that the parties had in view the law of the latter place in respect to interest." (2 Kent's com., 469, 4th ed.) So, also, it is clear, that although the interest of place of payment may

be agreed on, though it be higher than that of the place of the contract, yet, if the intent be to obtain usurious interest, the contract will be void. (Andrews vs. Pond, 13 Peters, 65.)

As, therefore, the place of the contract, in the absence of any corrupt intention, furnishes the rule, when the contract specifically gives interest, it would seem to follow necessarily that the contract, if valid there, would be valid at the place of payment, though it reserved a higher rate of interest than was allowed by law on contracts made at the latter place.

There is, however, another incident of this contract, which more peculiarly stamps its true character, at least in this State, and upon this proceeding. The bill is filed to have the benefit of a mortgage executed here upon [lands] situated here. This mortgage was made to secure the payment of a debt created here, reserving the legal interest of this State, and this was the domicil of the debtor. Can we refuse to enforce this contract, which strictly conforms to our own laws, merely because the money, to secure the payment of which it was made, was payable in another State, where the rate of interest was lower than it is here? In our opinion we cannot. It is not pretended that the form of the contract was a cover to evade the usury law of New York.

The contract is therefore to be considered as bona fide; it is authorized by our law, and we cannot refuse to enforce it.

We have not considered it necessary to examine at length the numerous English and American cases, cited by the plaintiffs' counsel on this point, to be found on the brief of their argument. None of them are precisely in point, though there are dicta going the length contended for by them. The cases cited by the defendants' counsel, from eighth Martin, and 6th and 7th Paige, are identical with this, and, in our opinion, determine the law correctly. We are conducted to this conclusion, not only because upon authority such appears to be the law, but also because it accords with sound morality and the obligations of good faith.

It is further contended that the bank had no power to make this contract by the charter.

The fifth article of the act incorporating the bank contains the general grant of power to the bank to hold real estate under certain restrictions, to deal in bills of exchange, &c.; a portion of the 6th article is as follows: "the rate of discount at which loans shall be made within this commonwealth, shall not exceed one-half of one per cent. for thirty days."

It cannot be doubted that the legislature may impose such terms as it pleases to the exercise of a power granted to a corporation, and if the power be not exercised in the mode prescribed, the act will be void. (Head and Amory vs. The Providence Insurance Company, 2 Cranch, 127; N. Y. F. Insurance Company vs. M. F. Insurance Company, 7th Wendell, 31.) Here the legislature have not prescribed the mode in which the power shall be exercised. The power to loan is expressly granted, with a prohibition that not more than six per cent.

per annum shall be taken or reserved upon its loans within the State of Pennsylvania. It may be conceded that a violation of this restriction would, within the State of Pennsylvania, render the act void. Such was the decision of the Supreme Court of the United States in the case of the Bank of the United States vs. Owens, 2 Peters, 527. The principle of the decision avowed by the court, and sustained by numerous citations, is, that the act, which in that case was lending money at a higher rate of interest than the charter authorized, was an act in violation of a public law, and therefore void. The same decision was made by the supreme court of Ohio in the Bank of Chilicothe vs. Swayne, 8 Ohio Rep., 258; but the reason assigned is, that the bank had no power to act, but in accordance with the terms of the charter, which is, perhaps, in substance, the same principle. A different conclusion was arrived at by the supreme court of Connecticut in the case of the Philadelphia Loan Company vs. Towner, 13 Conn., 249; where it was held that such an act was merely a violation of the usury laws of Pennsylvania, and the security only was void. In these cases, the act complained of was a violation of the statute law of the State where the contract was made; in the case of the United States Bank vs. Owens, of an act of Congress; but in this case there is no violation of any law. The prohibition of the charter, by its express terms, does not extend beyond the limits of Pennsylvania, and cannot have an extra territorial efficacy as a law.

It cannot be controverted, that a corporation, when permitted to act by the comity of another State within its limits, can exert no power, and do no act, which it is not authorized by its charter to do. These faculties, when exerted in a foreign State, must be in subordination to its laws and declared public policy. It would, therefore, have been a most useless act in the legislature of Pennsylvania to undertake to prescribe the conditions upon which it should exert its faculty of lending money in a foreign State, where, by comity, it might be permitted to act. All that it was in the power of the legislature of Pennsylvania to do was to give it the capacity to do the act. It did confer on it the power to lend money, and when it exerts this power in a foreign State, it must conform itself to the laws of that State. If the prohibition had been ten, instead of six per cent. per annum, most certainly this would not have authorized the bank to take more than the legal rate of interest at the place where the contract was made, and for the same reason it may take more if the law of the place permits it.

The error of the argument consists in not observing the distinction between the power to do an act and a mere incident of the power, which being purely accessorial, may be done or omitted without affecting the power itself. This precise point was thus decided by the supreme court of Louisiana, in the case of Frazier & Co., and others, vs. Wilcox and others, determined in May, 1843, of which we have seen a manuscript opinion of the court. That was the case of the Pennsylvania Bank of the United States establishing an agency in New Orleans for the purpose of banking. In the case cited, it had

made a loan at ten per cent. per annum, and the court held that, as that rate of interest was allowed by the laws of Louisiana, the contract was valid, notwithstanding the restraint in the charter onloans within the State of Pennsylvania.

The result of this investigation is, that the contract between Hitchcock and the bank is not usurious, or made in contravention of the laws of this State, and that the bank had the power to make such a contract within this State; it follows, therefore, that the mortgage taken by the bank to secure the debt, may be foreclosed. Here our task would be at an end, but for the peculiar form of the decree of the chancellor, that the complainants might, at their election, take a decree for a strict foreclosure, or have a sale of the mortgaged premises. This is only important to the defendants, upon the assumption that the mortgaged property is worth more than the debt secured by it. However improbable this may be, we cannot act upon the contrary presumption, but must assume that the heirs and creditors have an interest in the equity of redemption, which ought to be protected.

This brings us to the consideration of the questions which arise under the conveyance by Mrs. Hitchcock to the bank.

It is insisted by the counsel for the plaintiffs in error, that the devise was to Mrs. Hitchcock as executrix; that she could not act under the will except in her capacity as executrix, and that not having qualified as such, her acts were void.

The seventh clause of the will, in which the particular devise in question is made, is as follows: "For the purpose of having my estate properly settled and administered, during the minority of my children, I do hereby appoint my dear wife, Anne, my sole executrix. And I do bequeath and devise the same, both real and personal, to her, in trust, with full power to sell, either at public or private sale, all or any part thereof, and the proceeds to reinvest, and resell, at her discretion, for the purpose of paying my debts and legacies, or for a more advantageous investment, and good and sufficient deeds and conveyances to make therefor. It being my intention and will, that my estate shall be kept together and held in common for her benefit, and that of my children, until they shall have become of age respectively; at which time, and as soon after as any one of them comes of age, he or she is to receive their proportion; it being always understood that my wife is to receive an equal portion of my estate with my children, she and they having share and share alike."

The will was made on the 13th May, 1836. On the 13th September, 1836, he published a codicil reaffirming his will, and giving some additional legacies, and declaring that it should include all his estate, real and personal, to that date.

On the 4th August, 1837, he made a second codicil, in which he recites the great revulsion which had just taken place in commercial affairs, and expressed his apprehensions that it might affect his estate, and made some change in the legacies which he had previously given, and reaffirmed and republished the will in all other respects.

1836.

On the 21st February, 1838, he made a third codicil, in which he recites that he has purchased some real estate since the last codicil, which he desires his executrix to carry into effect according to the directions of his will.

On the 10th of August, 1839, he made a fourth and last codicil, in which he says he has reviewed the will and previous codicils, and adds: "I have no new testamentary disposition to make, but desire that my will, as it results from four papers heretofore executed by me, be carried into effect." And after enumerating the four testamentary papers, and describing them by their dates, he continues: "To the end, therefore, that my said executrix shall have full power to sell, convey, and dispose of real estate, as well as all other property, I again declare my intention, that such power to sell and convey shall extend to all lands acquired since the making of said testamentary papers, as well as to those acquired before, full power being intended to be given her in this respect. I do, therefore, affirm again the said testamentary dispositions, and desire them to be carried into full effect; the last, of course, controlling previous dispositions when inconsistent."

The office of the codicil is to explain, add to, or subtract from the provisions made in the will. It is annexed to the will; and in law, the will and codicils—if there be more than one—constitute but one instrument, (Fuller vs. Hooper, 2 Vesey, Senr, 242.) In Leavins vs. Butler, 8 Porter, 388, it is said by this court: "A codicil is a part of the will; it is therefore to be construed with it, and may, as a context, confirm, vary, or altogether change an intention expressed in the body of the will."

In the argument of this cause great stress has been laid on the language of the fourth codicil, as showing that the devise to Mrs. Hitchcock was in her character of executrix.

It does not appear to us to be a just criticism. The devise to Mrs. Hitchcock, in the will, is unconnected with her office of executrix, and the power conferred on her is such as does not appertain to that office. The estate, both real and personal, is devised and bequeathed to her, "in trust, with full power to sell, either at public or private sale, all or any part thereof; and the proceeds to reinvest and resell, at her discretion, either for the purpose of paying debts and legacies, or for a more advantageous investment," &c. More comprehensive language than this, to give her the absolute power over the estate, cannot be conceived. She had not only the power to sell in any manner she thought proper, but she might invest the proceeds in any other property and sell again; and this she might do in her discretion, either to pay debts and legacies, or to make a more advantageous investment for the estate.

The design of the different codicils is apparent; they were rendered necessary by changes in the estate of the testator. As he supposed his wealth was increasing, he increased his benefactions; and it is most honorable to his memory that one of the largest bequests was to the free school of the city in which he lived, of which he had been the munificent patron, and which almost owed its existence to his bounty. In

1837, foreseeing to some extent the calamity which impended over him, he makes some alterations in the legacies proportionate to the expected subtraction from his estate. In the last codicil, he declared that he has reviewed the former testamentary papers, and has "no new testament to make," and reaffirms the will and all the previous codicils. So far as we can judge from the codicils themselves, the principal design in their execution was, that lands acquired subsequent to the date of the will should be subject to its control. It is true, in the last codicil, he speaks of his executrix having power to sell real estate; but that he did not intend to circumscribe the power already given is shown in the next sentence, where he says: "I again declare my intention that such power to sell and convey shall extend to all lands," &c. Indeed, it would seem that if this is not a devise in trust, and not a mere power, it would be difficult by language to create one. Whatever might be the effect of this codicil standing alone, when considered in connexion with the will, to which it refers, and of which it is a part, not a doubt can be entertained as to its true intent and meaning; that it was the intent of the testator to vest Mrs. Hitchcock with full power over the estate, both real and personal, to sell and dispose of the same, as in her discretion she might think proper, without reference to her character of executrix; the devise to her was not for the purpose of sale merely, but "that it (the estate) should be kept together and held in common (by her) for her benefit and that of the children, until they respectively come of age." Can it be doubted, that if she had declined to qualify as executrix, it would not in the slightest degree have affected this devise in trust? See the case of Judson vs. Gibbons, 5 Wendell, 225, where a devise to "executors hereinafter named" was held to be a devise in trust to them individually, and not as executors, from the control given to them over the realty, until the youngest child came of age. See also the authorities cited on the brief of the defendant's counsel on this point.

We proceed to the consideration of the character of the sale and conveyance made by her.

It appears that, after the death of Mr. Hitchcock, Mr. Herman Cope, as the agent of the bank, came to Mobile to endeavor to make some arrangement in reference to the property of the bank in that place. That Mr. James Erwin, the brother of Mrs. Hitchcock, represented himself to be her agent, and after considerable negotiation, a compromise was effected, by which the bank was to advance $150,000 for the purpose, as was alleged, of paying the unsecured creditors of Mr. Hitchcock. In consideration of this advance, all defence to the bond and mortgage upon the bill, which had been filed during Mr. Hitchcock's life, was to be abandoned, and the bill suffered to abate by omitting to revive it. Mrs. Hitchcock was to convey to trustees for the bank all the estate and interest she had as devisee in the mortgaged premises; the bank to be let into immediate possession, and to relinquish all further claims on Hitchcock's estate, and take the mortgaged property for the debt.

The agreement was executed apparently in good faith; the money was paid; and Mrs. Hitchcock executed her deed, in which she recites

that, by virtue of the power conferred on her by the will of her husband, and in consideration of the sum of $773,453 23, (the amount of the mortgage debt and interest,) she "acknowleged, remised, released, conveyed, and forever quit claimed, unto the trustees of the bank, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law as well as in equity, in possession as well as in expectancy, all and singular," &c., describing the mortgaged property, &c.

This is beyond all doubt a conveyance of the equity of redemption in the mortgaged property. The legal title was already in the bank by the forfeiture of the mortgage, and there was nothing upon which the conveyance could operate if it did not convey the equity of redemption. Such was the intention of the parties to it, as is obvious from the previous negotiations, and such is its legal effect. Mrs. Hitchcock is estopped by the deed from denying that such was her intention. The argument urged that Mr. Jas. Erwin was not her agent, is answered by the deed itself; and if in truth, as alleged, she did not receive the money, it must be charged to her implicit confidence in the agent, whose acts she ratified by fulfilling all his engagements in her behalf. That this large sum of money was paid to Mr. James Erwin to extinguish the claim he set up to eight storehouses in Mobile, which were covered by the mortgage to the bank, would be incredible if it were not, as it is, fully disproved.

It is urged that a trustee cannot "release" his interest without other operative words of transfer. Conceding this to be the law in the case of a naked trust, the law does not apply to this case. All the estate, whether a legal or equitable, which Mr. Hitchcock possessed in the lands, passed by the will to his wife, for the purpose of enabling her to execute the trust; and if she had the power under the will of disposing of the equity of redemption—a proposition which must be admitted—it passed by this conveyance. As to the mode by which the transaction should be evidenced, it is apprehended that any assurance which would convey the fee would be sufficient for that purpose. It is, however, stated in 1 Powell on Mortgages, 260, in the note, "that a mere release, endorsed on the back of the mortgaged deed, will be a sufficient assurance; for, by that means the equity of redemption, if conveyed to the mortgagee, will become merged and annihilated in the legal estate; and the mortgagee will be seized of the fee simple, discharged of the mortgage." He, however, recommends a separate deed as more appropriate and usual.

But this deed is not, technically considered, a mere release. It is a quit claim deed, conveying all the interest which, as devisee, Mrs. H. took in the mortgaged premises; and if such an assurance would have been sufficient to convey the equity of redemption, if made by Mr. Hitchcock in his life[time], it is sufficient if made by his devisee. The bona fide of this act on the part of the bank agents, has been attacked, but we think without the least foundation in justice. The facts were

that the title of the land had been brought in question, and perhaps considered doubtful by the bill filed by Mr. Hitchcock, charging the bank with usury. To remove this objection, and to get into immediate possession of the mortgaged property, was the inducement to the compromise, for such in truth it was.

The charges on this head against the agent of the bank are founded on the supposition that the bank debt was illegal, and the mortgage invalid; and it is nowhere alleged or pretended that the equity of redemption was worth the price paid for the compromise. It would seem to be, in truth, if the money had been fairly applied to its legitimate purpose—the payment of unsecured creditors—a most valuable arrangement for them. It does, indeed, appear that some stratagem was to be resorted to to conceal the transaction from other creditors, which was certainly objectionable, as all artifice is. But we are unable to perceive anything illegal or immoral in the transaction on the part of the agents of the bank.

It is now ascertained that the debt was not usurious, and the mortgage a valid security; it is therefore impossible that the contract, by which the bank paid $150,000 to quiet their title and obtain peaceable possession of their own property, could be a fraud on any one.

The fact that the estate of Mr. Hitchcock was declared insolvent, after this contract was made, and executed by the payment of the money, does not affect its validity. In Darington vs. Borland, 8 Porter, 9, the court say, at page 33, "I apprehend that the just construction of this act, (the act of 1806,) is to make lands liable, no matter how devised, or into whose hands they may pass, unless sold by a decree of the orphan's court or of chancery, or unless when sold by a trustee authorized either expressly or impliedly by the will, the sale is bona fide, and the proceeds actually applied to the payment of creditors." In such a case, the right of the trustee, except so far as he has executed the trust, must yield to the paramount right acquired by the orphans' court by the decree of insolvency. Here, however, before the decree was made, the trustees had executed the trust and received the money; and the subsequent insolvency of the estate cannot vacate the sale, though it might entitle the administrator to the proceeds for the purpose of distribution among the creditors.

We come now to the consideration of the decree made in the cause by the chancellor. If no sale of the equity of redemption had been made, the decree would have been a common foreclosure and sale in the ordinary mode; and we are now to inquire, whether the agreement entered into by the agents of the bank with Mrs. Hitchcock authorized the decree made by the chancellor.

Our practice, certainly, is not to decree a strict foreclosure; but we think with the chancellor, that there is no impropriety in such a decree when the facts of the case warrant it. If the property mortgaged is clearly sufficient to pay the mortgaged debt, we can see no reason

why the mortgagee should be put to the expense of a sale, if he is willing to take a strict foreclosure. If the fact be not admitted, a reference might be made to the master to ascertain its value, and if the question were doubtful, and no consent given, certainly no such decree ought to be made.

In this case, although we consider the deed of Mrs. Hitchcock to be a conveyance of the equity of redemption, and that she had power under the will to make the sale, yet, under the circumstances of this case, it was clearly competent for the administrator, who, after the estate was declared insolvent, was a necessary party to the bill, as the representative of the creditors, upon the allegation and proof, either of fraud in the agreement made by the bank with Mrs. Hitchcock, or that the equity of redemption was worth more than was paid for it, to insist on a sale of the mortgaged premises. No such allegation is made.

The effort is to invalidate the bond and mortgage, and no suggestion has been made, that the mortgaged premises will more than discharge the debt; nor is it [at] all probable that it is adequate for that purpose.

No possible good, therefore, can result to any one from a sale of the property, but a most unnecessary expense would be incurred by such a course.

As, therefore, the entire reason for decreeing a sale of mortgaged premises rests upon the interest of the mortgagor, if he has none, and the mortgagee desires a strict foreclosure, we are of opinion he is entitled to it.

For the practice of the English and the American courts, and the reason on which it is founded, see 2 Story's Com. on Equity, 293, and cases cited.

In equity the maxim is, once a mortgage, always a mortgage.

If the parties stipulate that it shall be redeemable during the life of the parties only, the heir may, notwithstanding, redeem. [Newcomb vs. Bonham, 1 Vernon, 7.] So, also, in a similar case an assignee may redeem. [Pow. on mort., 118, *a*, note 1.] In Van Burgen vs. De Mareet, 4, J. C., 37, Chancellor Kent held, that although there was a power of sale in the mortgage, as the right to redeem existed, it was proper to file a bill.

Although the right of the mortgagee to purchase the equity of redemption is undoubted, yet a court of chancery looks with distrust upon such contracts, from the influence which the incumbrance gives the mortgagor over the mortgagee. Webb vs. Rorke, 2 Sch. & L., 673. See this doctrine fully stated in 1 Powel on mort., 123, in note. Such being the law, we entertain no doubt of the jurisdiction of the court. The mortgagee had a right to have his title quieted by a decree of the court, and, by bringing all the parties before it, to obtain the judgment of the court upon his title. The question of dower is not raised upon the bill, nor put in issue. It is not therefore proper to make any remark in relation to it. We have examined all the assignments of error, and believe that the opinion here pronounced covers them entirely.

Let the decree of the chancellor be affirmed.

Extract from Herman Cope, 3d assistant cashier's report, to Thomas Dunlap, esqr., president of the Bank of the United States:

BANK OF THE UNITED STATES, 30*th March*, 1840.

DEAR SIR: Soon after my arrival in Mobile, I was frequently drawn into conversation by some of Judge Hitchcock's friends, upon the interesting subject of his controversy with the bank, and more particularly with regard to certain charges made by the Judge against this institution and some of its officers, and reiterated from the pulpit in a formal sermon, delivered in one of the churches, and subsequently published and circulated in pamphlet, which I had seen, and one of which I hand you herewith, marked D. The statements I felt myself called upon to make in contradiction of those charges, and in explanation of the transactions of Judge Hitchcock with the bank, were not long in reaching the ear of his widow and of his brother, Major Hitchcock; and, as I afterwards understood, to send for Mr. James Erwin, the brother and adviser of Mrs. Hitchcock, to see if some adjustment of the difficulty could not be effected by compromise, and without further litigation—so exceedingly expensive to both parties; a fear also, I judge, when the whole facts were brought to light by a legal investigation, the memory of the Judge would not stand so well in the public estimation, was another motive with them to desire a compromise. The plea that was interposed by the Judge, and adhered to by his widow, of usury, to evade [the] payment of a debt which he could not but acknowledge just, could only be excused in a moral community on the ground of attempted injustice on the part of the bank; and when it was found, from my statement, that this excuse would be invalidated by positive testimony, the importance of an amicable settlement became much more manifest to them.

Mr. Erwin came to Mobile, and soon after made me a visit. This led to frequent and long interviews between us, in which the matters of difference between the estate of Judge Hitchcock and the bank were fully discussed, and which finally resulted in an amicable settlement of the debt; of the particulars of that settlement I have already made a detailed report in my letter to you of the 6th January last. It will not, therefore, be necessary here to recite them. Suffice it, then, briefly to say, in this place, that the debt, at the time of settlement, amounted to some $750,000, which was secured by the terms of another contract with the Judge of the 25th May, 1838, by his mortgage, on unincumbered real estate in the city of Mobile, valued by Mr. Poe, our agent there in 1837, at $1,486,200, which has been subsequently improved by the Judge, and by which the value has been increased to, say $1,125,000. The rent for the present year is $57,150, and will be for the next, it is said, $70,700.

There were large claims against the estate of Judge Hitchcock, said to be wholly unprovided for and unsecured, amounting to nearly $500,000. Of these Mr. Erwin himself held one of nearly $50,000; and the mechanics employed in the improvement of the property mortgaged to the bank for a considerable sum. To provide for these and some others

was a sine qua non with Mr. Erwin to any settlement of our claim. The equitable or confidential claims, as he called them, were, in the course of our negotiations, pared down, $150,000, with which sum Mr. Erwin undertook to dispose of them in such way as that they should not again be troublesome to the bank; and that amount Mr. Erwin agreed to receive in post notes of this bank, one-third payable in one year, with interest; and two-thirds payable in two years, with interest, as the consideration in hand, together with the debt of Judge Hitchcock, secured by mortgage, for his having conveyed to the bank in fee simple, with a clear and sufficient title, all and singular the real estate designated and described in that mortgage. This proposition I reported to you in my letter of the 6th January, before referred to, and which was duly accepted by the bank; and on receiving advice thereof I had duly carried into effect before I left Mobile. The bank, then, has received real estate in Mobile, valued by Mr. Poe, in 1837, $1,125,000, in absolute payment of the debt of Judge H., and for the post notes advanced in settlement, amounting together, with the interest to date, to about $925,000, and the rents on the real estate reserved will pay, it is supposed, about 7 per cent. per annum upon the cost.

The arrangement, after much difficulty, was consummated on the day before I left Mobile, by the formal execution of an absolute deed of conveyance by Mrs. Hitchcock, as the sole devisee of Henry Hitchcock, under his last will, (an authentic copy of which accompanies this report, marked E,) to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors and survivor of them, and *their* heirs, executors, administrators, and assigns of such survivor, forever; passing the complete legal title of herself as the sole devisee, and by the assignment of all the leases, and taking actual possession of unprovided property, by running a cheap fence around it; thus placing the bank in entire and quiet legal possession of the whole property; a position in which our solicitor (Mr. Campbell, the adverse counsel concurring,) believes we cannot be attacked from any quarter without a previous tender of our whole claim and legal interest. To this, however, it is proposed, by way of greater caution, to add the appointment of a friendly administrator, (Mr. A. Erwin, Mrs. Hitchcock's brother,) who must necessarily be a party to every proceeding adverse to the bank, and who will not concur in any such, and thus make ourselves secure, beyond the possibility of disturbance. In confirmation of this, I would refer you to the official letter of Samuel G. Fisher, esq., our solicitor, and addressed me under date of 10th February, 1840, herewith, marked F; all which is respectfully submitted.

HENRY COPE, 3*d A. C.*

THOMAS DUNLAP, esq.,
Pres't B. U. S., Phil'a.

Extract from the original in the B. U. S., and compared by me. A true copy. Referred to in my answer to thirteenth cross interrogatory.

HERM. COPE.

ORPHAN'S COURT, MOBILE COUNTY, *October* 30*th*, 1841.

In the matter of the estate of Henry Hitchcock, deceased.

This day came Isaac H. Erwin, administrator with the will annexed of Henry Hitchcock, and presented his report and petition on oath, showing that there are not assets in his hands, or within his power or control, sufficient to satisfy the just demands of creditors against said estate, real and personal, and of the claims filed against him as administrator. And it appearing to the satisfaction of the court, that the assets within the power and control of the said administrator, real and personal, are not sufficient to satisfy the just debts due to the creditors of said estate, it is ordered that the said estate be declared to be insolvent, and subject to distribution and apportionment among creditors in the mode provided by the statute in such case made and provided.

Ann Hitchcock's dissent from will and claim for dower.

To the honorable the judge of the county court of Mobile county, State of Alabama—the declaration of Ann Hitchcock, widow of Henry Hitchcock, late of Mobile county, deceased, unto your honor, respectfully shows:

That the said Anne Hitchcock is the widow, and was in the lifetime of said Henry Hitchcock the lawful wife of said Henry; that the said Henry resided, in his lifetime, in the city and county of Mobile, and died in said city on the eleventh day of August, in the year eighteen hundred and thirty-nine; that the said Henry left a last will and divers codicils in due form, which will and codicils were duly proved and recorded in the county court of Mobile county, and in which provision is made for the said widow. And the said Anne Hitchcock having considered of the provisions of said will and codicils made for her benefit, doth declare and make known to this honorable court, that she doth waive and renounce all the provisions in said will and codicils made in her favor, and claims such dower in the land and estate of her said late husband, and such other provisions as she may be lawfully entitled to as a widow, independently of said will and codicils, by the laws of the State of Alabama; hereby electing such legal benefits, and renouncing forever of record all the dispositions of said will made in her favor, in order to obtain the benefits secured to her by law, in conformity with the statutes in such cases made and provided.

ANN HITCHCOCK,

By her attorneys,

STEWART & EASTON.

Mobile, August 15, 1840.

To the honorable the judge of the county court of Mobile county, State of Alabama.

The declaration of Ann Hitchcock, widow of Henry Hitchcock, late of Mobile county, unto your honor, respectfully shews, that the

said Anne Hitchcock is the widow, and was in the lifetime of said Henry Hitchcock the lawful wife of said Henry Hitchcock; that the said Henry Hitchcock resided in his lifetime in the city and county of Mobile, and died in said county on the 11th day of August, 1839; that the said Henry left a last will and divers codicils in due form, which will and codicils were duly proved and recorded in the county court of Mobile county, and in which provision is made for the said widow. And the said Ann Hitchcock, having considered of the provisions of said will and codicils, doth declare and say, that she doth renounce and waive all the provisions in said will and codicils made for her benefit, and claims such dower in the lands and estate of her said late husband, and such other provisions as she may be lawfully entitled to as a widow, independently of said will, by the laws of the State of Alabama; hereby electing such legal benefits, and renouncing forever all the dispositions of said will made in her favor, in order to obtain the benefits secured to her by law in conformity with the statutes in such cases made and provided.

Witness the hand and seal of said Anne Hitchcock, this 14th day of August, in the year eighteen hundred and forty.

ANNE HITCHCOCK. [SEAL.]

Filed August 13, 1840.

WM. TAYLOR, *Clerk.*

THE STATE OF ALABAMA,
Mobile county.

I, Drury Thompson, clerk of the county court of Mobile county, State aforesaid, do hereby certify, that the foregoing page contains a true copy of the original on file in my office.

Given under my hand and seal, this the 16th April, A. D. 1849.

Attest: D. THOMPSON, *Clerk.*

[*Opinion.*]

ANNE HITCHCOCK
vs.
JAMES DUNDAS, MORDECAI D. LEWIS, Samuel W. Jones, Robert L. Pitfield, and Robert Howell.

ANNE HITCHCOCK
vs.
JAMES DUNDAS, MORDECAI D. LEWIS, Samuel W. Jones, Robert L. Pitfield, and Robert Howell.

These two cases will be considered together, as they have been so argued by counsel. They both depend on the same evidence and

the same legal principles, and are so nearly identical in all their features, that I cannot well see why they were not included in one bill.

The bills are filed for dower in the lands they describe, against the defendants as agents and trustees of the Bank of the United States of Pennsylvania; and the facts they set forth clearly entitle the complainant to recover, unless they are overcome by the matters of defence disclosed in the answers and pleas of the defendants.

The objections to the right to recover are, that Henry Hitchcock, the husband of the complainant, was indebted in his lifetime to the said bank in the sum of six hundred and twenty-five thousand five hundred and thirty $\frac{99}{100}$ dollars; and on the 14th July, 1838, executed his bond for that amount to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, acting as agents and trustees of the bank; and on the same day, to secure the payment of the bond, executed a mortgage in fee to the same persons of the premises described in the bills; and that the complainant joined her husband in the said mortgage, and also made in writing her relinquishment of dower, which was duly acknowledged before the proper officer, and by him certified conformably to the laws of the State of Alabama.

That the said Henry Hitchcock died in the year 1839, leaving his last will and testament, in which he appointed complainant his sole executrix, and bequeathed and devised unto her the whole of his estate, real and personal, in trust, with full power to sell the whole or any part thereof at public or private sale, and to make sufficient deeds and conveyances therefor, and made her also one of the distributees of his estate.

That after the death of the said Henry Hitchcock the complainant entered upon and took possession of the estate; that she granted leases, received rents, and exercised acts of ownership and control over the same; that while she was so in possession she executed to the said Cowperthwaite, Dunlap, and Cope, a full and absolute release, for the consideration therein expressed, of all the lands specified in the bills, and surrendered to them the possession of the said lands; that she assigned to them the leases which had been made, and delivered over all the evidences of title to the said premises.

That in consideration thereof the said Cowperthwaite, Dunlap, and Cope released all claim upon the estate of Hitchcock, and agreed to look to the mortgaged property alone for satisfaction of their said debt.

That the defendants have heard, and so believe and aver, that the said Cowperthwaite, Dunlap, and Cope did, in addition to the agreement aforesaid, advance to the said Anne or her agent one hundred and fifty-thousand dollars, to be applied to the payment of certain of the debts of the said Henry Hitchcock, as a part consideration of the said deed.

That after the execution of the said deed the said Anne refused to qualify as executrix, repudiated the provisions made for her in the will, and claimed dower in lieu thereof, all of which were filed and recorded in the orphans' court of Mobile county; and that Isaac H. Erwin was

appointed administrator with the will annexed, who intermeddled with the property and disturbed the possession of the said grantees.

That in the year 1840 Cowperthwaite, Dunlap, and Cope, with the president, directors, and company of the United States bank of Pennsylvania, filed an original bill in the court of chancery at Mobile, against the said Isaac H. Erwin, the children of Hitchcock, and the complainant, setting forth the debt and mortgage, the transactions of the settlement with the complainant, and the disturbance of their title and possession, and claim to have the equities of the parties defendants foreclosed, and the titles of the plaintiffs quieted and secured.

That the said Anne Hitchcock, with the other defendants, appeared to the said bill, and at the term of the court of chancery at Mobile the cause came on to be heard for a final decree; and thereupon it was so declared, that the said Anne did hold and take an absolute interest in the said lands by virtue of the said will; and that the said interest by her deed was vested in the said Cowperthwaite, Dunlap, and Cope; and the said parties were, under the terms of the said decree, foreclosed of all their interests in the said property, unless the debt and costs were paid pursuant to the decree; that the cause was removed to the supreme court of the State of Alabama, and the decree was affirmed at the January term, 1845; and the defendants aver that the effect of the decree is to debar the said complainant of all right and claim of dower to the property.

The answer further alleges, that the deed of release made by the complainant of the 8th February, 1840, and other acts of ownership over the lands and estate, show that she elected to accept the provisions of the will in lieu of dower, and that she is bound by said election.

All these matters of defence are condensed and reiterated at the conclusion of the answer in the form of pleas, in bar of the relief prayed for in the bills, and present for consideration the following questions:

1st. Does the decree in chancery suit above stated bar the widow of her right of dower?

2d. Does her alleged joining with her husband in his mortgage to the bank, and her release of the same date written thereon, convey her dower?

3d. Does the release or quit claim deed of the eighth February, 1840, convey the dower as well as the estate owned by Hitchcock in the lands in his lifetime?

4th. Do the said release and other acts of ownership constitute a binding election to accept the provisions of the will?

These questions will be examined in the order here indicated. It will be premised that the defendants in their answer state that several pieces of the land described in the bills are held by them under titles paramount to that of Hitchcock, which they designate in a schedule attached to the answer.

This I understand as the agreement to be conceded by counsel, and the claim to dower in these lots will be considered as withdrawn. First, then, does the decree in the chancery suit bar the widow of her right of dower.

I have looked through the record and proceedings in that case, and am convinced that the dower interest of Mrs. Hitchcock was not put in issue, or in any way litigated, and that under any proper construction it is not embraced by the decree.

The great and only purpose of the suit was to decree to the bank the title which was in Henry Hitchcock at his death by a decree of strict foreclosure of the mortgage.

In the original bill the mortgage and will of Hitchcock, and the release under the authority of the will, are set forth and particularly described; and the fact that Anne Hitchcock was not made a party defendant, proves very strongly that her individual interest was not designed to be affected. She is made a defendant in the supplemental bills, but this was obviously done to establish the agreement and compromise in relation to the defence of usury which Judge Hitchcock had opposed to the bond and mortgage in his lifetime, so as to meet the same objections now threatened, and afterwards actually made by his administrator, Isaac H. Erwin.

But if the statements and charges in the body of the bill and supplements leave any doubt as to the real object of the suit, it is certainly removed by the prayer in the conclusion for specific relief; that is as follows:

That the equity of redemption in the premises aforesaid, which was of the said Henry Hitchcock, and may be now in his personal representatives, and all equity of redemption in the said premises which was in the said Henry Hitchcock, and is claimed and derived through or under him, by all and any and every person or persons, be forever barred and foreclosed.

When a bill is filed against an individual in one character, a decree cannot be rendered against him in another and different character; (*a*) and though there is a prayer for general relief, yet it would be inconsistent with the specific, relief prayed to decree against Mrs. Hitchcock as dower. (*b*)

Keeping in view the object of the bills, the decree cannot be construed to include the dower interest of Anne Hitchcock. So much of the decree as is applicable is as follows: "That the bond and mortgage described and set forth in the bill were lawful and valid in their creation; and that the compromise and deed of conveyance, made by Anne Hitchcock, after the death of Henry Hitchcock, are binding and conclusive on the defendants; and that in virtue thereof all the estate of the mortgaged premises is vested in the complainant. When the chancellor says that the deed of Mrs. Hitchcock is binding on the defendants, and that in virtue thereof all the estate of the mortgaged premises is in the complainant," he is understood to mean all the estate which was in Henry Hitchcock at his death.

To give the decree any other construction would be unjust to the learned chancellor who pronounced it, as it would make it extend to

(*a*) 4 Mumf., 140. (*b*) 2 Mead., ch. 171.

objects not contemplated by the parties, and in other respects violate the plain and familiar rules which uniformly govern courts of chancery.

I therefore concur in the opinion of the supreme court of this State, that the question of dower is not raised upon the bill, nor put in issue; and add, is not embraced by the decree.

2d. The next objection to the bill is, that the complainant conveyed her dower to the bank by uniting with her husband in his mortgage of the 14th July, 1838, and by her release or relinquishment of dower of the same date written on the mortgage.

The mortgage is in the name of Henry Hitchcock alone. In no part of it does the name of the complainant appear; nor does it purport to be the joint conveyance of herself and her husband. It commences thus: Know all men by these presents, that I, Henry Hitchcock, of the county and city of Mobile, and concludes with the words given under my hand and seal, this 14th day of July, in the year of our Lord 1838. It is signed and sealed by Henry Hitchcock, and immediately under his name is the signature and seal of Ann Hitchcock. Then on the same sheet follows the relinquishment of Anne Hitchcock in the following words: And I, Anne Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish, by these presents, all my right and title of dower in and to the above described premises to the said Joseph Cowperthwaite, Thomas Dunlap, nd Herman Cope, the survivor or survivors of them, and to the heirs, executors, and assigns of such survivor forever.

Witness my hand and seal, this 14th day of July, A. D. 1838.

ANNE HITCHCOCK, [SEAL.]

Attest: CHARLES A. MARSTON.

Then comes the following certificate of acknowledgment:

THE STATE OF ALABAMA,
Mobile county.

Personally appeared before me, Charles A. Marston, notary public in and for said county, the above named H. Hitchcock, who acknowledges that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned; and also appeared personally before me, Anne Hitchcock, wife of the said H. Hitchcock, who being examined privately and apart from her husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely and of her own accord, and without any fear, threats, or compulsion of her husband.

Given under my hand and seal notarial, this fourteenth day of July, 1838

CHARLES A. MARSTON.

The mortgage deed contains no words of grant from Anne Hitchcock,

and therefore does not convey her dower interest, (*c.*) This is conceded by the defendant's counsel, and need not to be further examined. There is no objection to the deed of relinquishment and the difficulty arises from the form of the certificate of the notary public. This officer is authorized by the laws of the State to take acknowledgment of deeds and relinquishment of dower. The third section of the act of 1803, and now in force, provides that no estate of a femme covert in any lands, tenements, or hereditaments lying and being in this State, shall pass by her deed or conveyance without a previous acknowledgment made by her on a private examination, apart from her husband, before one of the superior judges, or a judge of the county court, that she signed, sealed, and delivered the same as her voluntary act and deed, freely and without fear, threats, or compulsion from her said husband, and a certificate thereof written on or under the said deed or conveyance, and signed by the officer before whom it was made; and every deed or conveyance so executed and acknowledged by a femme covert, and certified as aforesaid, shall be good and effectual to convey the lands and tenements thereby intended to be conveyed.

By the common law, a married woman could not by any deed or conveyance bar herself of dower, and this can only be effected in England by the husband and wife joining in levying a fine of the husband's estate. (*d.*) This proceeding has never been recognised or established in this country; and it follows that the dower interest of a married woman can only be conveyed by virtue of legislative authority. From the particularity and apparent caution observed in the above enactment it is obvious that the general assembly viewed the dower interest of the wife in the most favorable light, and concurring with the common law, held the just opinion that her claim to a maintenance and sustenance out of her husband's estate is founded upon a moral as well as legal right. (*e.*)

However formal and binding in its terms the deed of relinquishment may be, it is of no legal validity, unless accompanied by a certificate of acknowledgment as the act above referred to directs; the certificate must show that the wife acknowledged the execution of the deed by which her dower is conveyed away. The recorder of the clerk's office of the county court has been examined, to show that when the relinquishment of the wife is made on the mortgage of her husband, it is usually designated by the name of the deed signed by the husband, that is, that she signed the foregoing indenture of mortgage, instead of the foregoing deed of release or relinquishment of dower. That officer states that the forms used in his office are various, and that in many instances they are like the one used in the present case.

The object of the certificate is to identify the instrument signed, and if it appears that the officer clearly alludes to it, it might be said to be a compliance with the statute, though he calls it by a wrong name.

But here the signature of Mrs. Hitchcock appears to both instruments, and the notary certifies that she acknowledged the execution of one only,

(*c*) 3 Mann. C. C .Rep., 347. (*d*) 2 Powell, on Mort., 673. (*e*) 1 Story, Eq. Juris., 629.

and is silent as to the other; this is true; in point of fact, there is no misnomer of the paper.

Suppose the name of Judge Hitchcock had appeared to both instruments, and the officer had certified that he signed, &c., the foregoing deed of relinquishment, could this be construed to embrace the mortgage? I think clearly not; and yet the cases are exactly parallel.

But it is insisted that the whole paper is to be taken together; that it constitutes one mortgage; and that the certificate of the notary public applies to all the signatures and deeds that precede it.

The books show many cases where two or more instruments are taken as one entire contract, or parts of the same contract; when this is the case, those subsequent to the first generally restrict or enlarge, or in some way modify, the former. They of necessity must, therefore, be executed by the same parties. The cases referred to by the defendant's counsel are of this character. The dower estate of a wife is separate and distinct from that of her husband. It is in no manner subject to his control, and can only be conveyed by a contract made with herself. Though the relinquishment was made on the same day and on the same paper with the mortgage, yet it has all the characteristics of a separate, and distinct, and independent contract The parties are not the same; the subject of the contract is not the same; and it is made on an entirely new consideration. In Powel and wife vs. the Monson and Brumfield Manufacturing Company, (*f*,) a case similar to this in several of its features, this very question came up and was elaborately considered by Mr. Justice Story. The question arose under the laws of Massachusetts, which provide, that a widow shall not be barred of her dower unless she joins with her husband in the deed for the mortgage or sale of his lands.

A former husband of Mrs. Powel, one of the complainants, had conveyed the premises in question to the defendant, to which conveyance she was not a party; afterwards she executed her relinquishment of dower on the back of the original deed, for the asserted consideration of two hundred dollars. The question was, whether this was joining with her husband in the conveyance within the sense of the statute. The learned judge was very decided in his opinion that it was not, and decreed in favor of the dower. It is true that the relinquishment was executed some months after the deed and sale, but the decision was based on the new consideration expressed in the release. But it is affirmed that Mrs. Hitchcock had the right to redeem, and this proves that the right to release follows, and is controlled by the mortgage, and that is a part and branch of that instrument.

The legal principle here asserted is not admitted; on the contrary, it is believed to be well established that the widow *has* no right where she joined her husband in a mortgage in fee, or otherwise relinquished her dower. Dower is a strictly legal right, resulting from the seizin of the husband. When he mortgages his lands, he parts with the legal estate, and retains only the equitable right to redeem; and no prin-

(*f*) 3d Mason R., 347.

ciple is better settled than that the wife is not entitled to dower out of the equitable estate of her husband. (*g*) In the case of Darcy vs. Blak- (*h*) Lord Redesdale remarked, that it has been so long and clearly settled, that a woman should not have dower in equity who is not entitled at law, that it would be shaking every thing to disturb the rule. If the wife have the right to redeem, no conveyance by the husband could, of the equity of redemption, could deprive her of it. But the contrary rule was settled in the case of Steele vs. Carroll, (*k*.) In that case the mortgage was made by the husband and wife, and the mortgage deeds were acknowledged by the wife on privy examination.

The husband conveyed the equity of redemption, and the suit was brought to recover the wife's dower. The opinion of the justice was positive and emphatic. So much of it as is applicable is as follows: "It is not necessary to refer to adjudged cases, for the purpose of proving that, according to the principles of the common law, a widow is not dowable of her husband's equity of redemption; and if a man mortgage in fee before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower. In this case the mortgages were made during coverture, but the mortgage deeds were acknowledged by the wife on privy examinations; and these acknowledgments, under the acts of assembly of Maryland of 1715, ch. 47, and 1766, ch. 14, which are in force in this district, debarred her of the right of dower to the lots thus conveyed to the mortgagee.

The legal estate passed to the mortgagee, and the husband retained nothing but the equity of redemption, and as his wife had no right of dower to this equitable interest, the deed of Steele to Miller of 28th January, 1811, above mentioned, conveyed to Miller the whole interest which had remained in Steele. It was unnecessary for the wife to join in, or to acknowledge this deed. For, as she had no right of dower to the equity of redemption, she had no interest to relinquish when her husband conveyed to Miller.

If she had no interest to relinquish, she certainly had no right [to] redeem. The conclusion, therefore, is, that the mortgage of Henry Hitchcock and the release of Ann Hitchcock are distinct and separate deeds, and that the certificate of acknowledgment by the notary public is not a compliance with the act of the legislature.

3d. The next objection is, that the release or quit claim deed of the 8th February, 1840, conveys the dower as well as the estate in the lands owned by Judge Hitchcock before his death.

This point the defendant's counsel have pressed with earnestness, and argued with ability, resting mainly on the strong and comprehensive language employed in the conveyance itself. The deed commences as follows: This indenture, made the 8th day of February, 1840, by and between Ann Hitchcock, widow and sole devisee of Henry Hitchcock, late of Mobile county, acting under and by virtue of the last will and testament, and the several codicils thereunto annexed, of the said Henry Hitchcock, duly proved and recorded in the orphan's court of

(*g*) 2 Powel on Mort., 688. (*h*) 2 Sho. & Leaf., 388. (*k*) 12 Peters, 205.]

Mobile county, of the first part; and Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, and State of Pennsylvania, of the second part, witnesseth.

And after stating the consideration the deed proceeds, hath remised, released, and forever quit claimed, and doth by these presents remise, release, convey, and forever quit claim, to the parties of the second part, the survivor or survivors of them, and the heirs, executors, administrators, and assigns of such survivor, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law as well as in equity, in possession as well as in expectancy, in, to, or out of, all and singular the following described lands and premises.

After the description of the lands comes the habendem clause, as follows, "to have and to hold all and singular the aforesaid lands, tenements, improvements, and appurtenances, unto the said parties *of the second parties* of the second part, the survivor and survivors of them, and the heirs, executors, administrators, and assigns of such survivor, to their own proper use, benefit, and behoof forever; so that neither the said party of the first part, her heirs or assigns, or any person or persons sons whatever in trust for them or her, or in her or their name or names, can or may, by any way or means whatever, hereafter have, claim, challenge, or demand, any right, title, interest, or estate, of, in, to, or out of, all and singular the premises above described, and hereby released and conveyed, but therefrom and thereout, are and shall be, by these presents, forever excluded and debarred.

The terms used in this deed are as broad and comprehensive as could have been employed, and if made by Henry Hitchcock would have passed every possible interest owned by him in the premises; to acquire all his estate in the lands, or a fee simple, was the great purpose of the bank, and it was undoubtedly the design and object of the release to convey it.

To one reading the deed the question constantly recurs, is the grantor conveying her own individual interest, or the estate of her husband; and it is as constantly answered by the explicit declaration in the beginning of the conveyance, that it is made by the grantor as the sole devisee of Henry Hitchcock, deceased, acting under and by virtue of his last will and testament. I think it is clear that this declaration controls the subsequent parts of the deed, and that the covenant for quiet enjoyment and the *enumeration* of the *contracts* conveyed, were made in direct reference to it, and are limited and restricted by it to her character as devisee and representative of Henry Hitchcock, deceased. Every expression in the deed is suitable to this character, and I do not see that any language is introduced to change it. The dower estate in this large and valuable property was too important to be overlooked and left to implication. If it was designed by the parties to include it in the deed, nothing was easier than to have so expressed it; and it is not to be supposed that the release would have been otherwise received by the agent and trustee of the bank, who was also one of the grantees. That the dower was not one of the subjects of

the contract is made evident from the fact that in *in* all the conversations and interviews between Erwin and Cope hereafter noticed, acting as the agents of the respective parties, it is not mentioned, and no allusion whatever made to it. It is highly probable that all concerned were resting in the belief that it had already been conveyed by the release on the mortgage of *the* 1838. This construction is given to the deed, without reference to Mrs. Hitchcock's being one of the beneficiaries of the will. Viewing her as such brings up the next question, which is

4th. Do the release and other acts of ownership constitute a binding election to accept the provisions of the will in lieu of dower? The will contains the following clause: For the purpose of having my estate properly settled and administered during the minority of my children, I do hereby appoint my dear wife Anne my sole executrix, and I do bequeath and devise the same, both real and personal, to her in trust, with full power to sell, either at public or private sale, all or any part thereof, and the proceeds to reinvest and resell at her discretion, for the purpose of paying my debts and legacies, and for a more advantageous investment, and good and sufficient deeds and conveyances to make therefor. It being my intention and will that my estate shall be kept together and held in common for her benefit and that of my children, until they shall become of age respectively; at which time, and soon after as any one comes of age, he or she to receive his or her proportion, it being always understood that my wife is to receive an equal proportion of my estate, she and they having share and share alike.

The rule of the common law on the subject of dower has been changed by the statutes of this State. By the former, the widow was allowed to have her dower and take under the will also, unless it was clearly intended that one should be a substitute for the other. By the latter she shall not receive the provisions of the will and dower, unless it plainly appears that such was the intention of the testator.

The first section of the act of 1806 provides that the widow may, in all cases, waive the provisions made for her in the will of her deceased husband, and claim her dower, which shall be assigned her accordingly; in which case she shall receive no part of such provision, unless it appears plainly in the will that the testator intended it in addition to her dower. The first section of the act of 1812 requires that she shall make her election within one year after the probate of the will. "This was done by the complainant." Otherwise she will be held to have accepted it.

The section provides, that when any person shall make his last will and testament, and not therein make any express provision for his wife, by giving and devising unto her such part and parcel of his real and personal estate as shall be satisfactory to her, such widow may signify her dissent therefrom in the superior or county court of the county wherein she resides, at any time within one year after the probate of such will; and then, and in that case, she shall be entitled to dower in the following manner. (*l*)

(*l*) Aiken's Digest, 182.

Though the widow is allowed the period of one year to signify her dissent, yet if she sooner clearly elects to take under the will, she [will] not be permitted afterwards to claim her dower.

As there is no clause or part of the will showing that the testator intended the legacy of his wife in addition to her dower, the case is beyond dispute one of election.

The proof is very explicit, that after the death of her husband the complainant took possession of the entire estate; that she leased it and disposed of leases which had been previously made, and in other respects controlled the property as her own; and, finally, that she executed the conveyance before mentioned of the 8th February, 1840, to the trustees of the U. States Bank, for all the parcels or tracts of land out of which she claims to have her dower assigned.

Do these acts constitute a binding election on the complainants? This question will be first considered as if no other or larger consideration was paid than what was expressed in the deed, which was the exact sum and interest due on the mortgage.

The connexion of James Erwin, the agent of Mrs. Hitchcock, with the subject, and the additional sum of one hundred and fifty thousand dollars, alleged to have been paid, will be afterwards examined.

Whether in any particular case, where a party is bound to elect, his acts constitute a binding election, must depend on its own peculiar circumstances; and a satisfactory conclusion can only be arrived at by comparing it with other cases that have been deliberately adjudicated.

In Roper on Legacies, page 440, the case of Shadford vs. Powell is stated as follows: "Lord Alborough, by deed in 1799, conveyed to his wife, Lady Alborough, his house, furniture, paintings, &c., and by will in 1800 bequeathed to her the same, with other property, for her life, with remainder to her issue. He died in January, 1801, and she married the defendant in the December following.

After the death of Lord Alborough, Lady Alborough entered into possession of the devised premises, defended an ejectment as devisee, and received the rents up to her death, which happened in July, 1802.

The master of the rolls, in Ireland, decided that although possession alone did not amount to election, without full knowledge of those rights, yet the possession of Lady Alborough complied with the circumstances of the defence of the ejectment, with full knowledge of her rights, and the declaration of her intention to abide by her husband's will, and which appeared by the evidence, amounted to an election, binding upon her and her representatives.

In the case of Bathicke vs. Bradhurt (*m*) the wife received the rents and profits of the real and personal estate for five years after the death of her husband, the testator, which he had devised to her. She then instituted suit, claiming to elect to take an interest in a trust fund of £2,000, under her marriage settlement. It was decided that she had precluded herself from any right of election. Lord Thurlow, in delivering his opinion, observed, "that if the wife had filed a bill,

(m) 1 Ves. p. 172;

stating she did not know the state of the fund, and desiring to have the debts and legacies paid, and the property cleared, that she might elect to advantage; she might have done so; but her having taken possession under the will, and the estate being a free fund from the beginning, I cannot think of a principle upon which the court can say she is not competent to elect." The bill was dismissed. In the case of Brode vs. Barnes (*n*) it is to be inferred, that a married woman concurring with her husband in selling her real estate, in regard to which she was bound to elect, such sale will be regarded as an election.

The following are cases where the acts of a party who has made an election, either expressly or by implication, were held not to be binding:

In Wake vs. Wake (*o*) the testator bequeathed to his wife £100, to be paid out of his personal estate within six months after his death; and, after some particular dispositions, gave all his estate and effects whatsoever, subject to an annuity of £35 to his wife for life, in trust to his son by a former wife, whom he made residuary legatee. The widow received her legacy and also the annuity for three years, and then brought a bill claiming both the interest under the will andher dower, which was about £80 a year.

The trustees let the son into possession at 21, according to the directions of the will. The court being of opinion that the widow ought to elect, the question was whether, by receipt of the legacy and annuity for three years, she had not made the election to abide by the will. Buller, J., for Lord Thurlow, C., decided that these acts did not bind her to take under the will.

He observed: "If the argument for the defendant holds, a single payment would have bound her; but the point is, whether she had full knowledge of the circumstances of the testator and of her own rights. I think there was a case before me, about two years ago, at Lincoln Inn's Hall, which went much beyond this. If she had acted with full knowledge, she should not afterwards deny it; but after three years only, I cannot say she is not entitled. The legacy of £100, and what she had received from the annuity, must be accounted for.

In Pusey vs. Desbourrie, (*p*) Sir Edward Desbourrie, a freeman of London, had a large personal estate, and had compounded with his wife for her customary part. He had a son, the defendant, to whom he had given large sums to advance him in business, and a daughter. By his will he gave his daughter £10,000, upon condition that she released her orphanage part and all her rights to his personal estate by the custom of London or otherwise, and made his son executor. After the testator's death, it was agreed between the son and daughter that she should take the legacy of £10,000 upon theterms of the will, and a release was accordingly prepared.

Before she executed it, her brother, in the presence of their uncle, informed her that she had a right to have an account of her father's personal estate, and to claim her orphanage part; but she declared that she would accept the legacy left by her father, observing that it was

(*n*) 2 Ves. and Bea., 127. (*o*) 1 Ves., 335. (*p*) 3 P. Will., 315.

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sufficient for *for* any young woman. She accordingly executed the release, being about twenty-four years of age, and her brother paid the legacy with interest. She afterwards married Pusey, an attorney, who filed a bill to set aside the release, charging, among other things, that the daughter's share was worth £40,000. Lord Talbot, C., decided, that though he saw no fraud in the case, yet he conceived it hard that the sister should suffer for her ignorance, and that she might well be ignorant of her rights, as the courts themselves had not till recently agreed in what proportions these customary parts should go, and she ought not to suffer or give others an advantage by her ignorance.

That although the son had informed her of her right either to accept the legacy or orphanage part, yet he hardly thought she knew she had a right to have an account taken, and first know what her orphanage part did amount to. And then, and not till then, she was bound to make an election; for probably she would not have accepted the legacy had she known what the orphanage part would amount to. The hearing was postponed until it could be ascertained what the father's personal estate at the date of the will and his death amounted to. The case was afterwards compromised. In Kidny vs. Coussmaker (*q*) the widow executed a release to the executor and trustees of all her dower and thirds. Afterwards a creditor set up a claim to the property her devised to the wife by the will; against this claim it was objected, on the part of the widow, that had it been set up at the time she elected she would not have elected, as she did, to take the devised estate in satisfaction of the dower; that she had a right of an inquiry whether she was entitled to dower or free beach, and what its value was. It was decided that the widow was not bound by any election she had made; that she must be let into any of her legal rights, and an inquiry made in what estate she was entitled to dower or free beach; her election [was] made under a mistaken impression that the creditors were not to make any claim upon these estates not binding her.

In the case just referred to, in every instance, the widow or legatee received and appropriated to her own use the money or property which had been devised by the testator. Here there was nothing received by the widow, either for her own benefit or the benefit of the estate. Her contract with the bank simply converted a conditional into an absolute sale, without any new or additional consideration. The estate was confessedly insolvent, so that the right to redeem was unavailing and of no value.

There is little doubt that the lands were not worth more than the sum or consideration stated in the mortgage, and could not have been sold for any greater amount. There was, therefore, no substantial right conveyed to the bank which could not have been readily obtained by filing a bill to foreclose the equity of redemption. This indeed was done, and the fee in the estate was acquired, and is now held, by a decree in chancery on a bill to foreclose the mortgage; so that the interest of the bank

(*q*) 12 Ves., 136.

and the estate of Hitchcock are unaffected one way or the other by the release, and are in the condition they would have occupied if it had never been executed. (r) I think, therefore, that the deed by Mrs. Hitchcock, her taking possession of the property, &c., are not such acts as bind her to accept the provisions of the will. But however strongly these acts might imply an intention to elect, she is protected by the rule which the cases before referred to establish, that the acts of a party, though indicative of an intention to elect, are not binding, unless done with full knowledge of his rights? This principle is distinctly recognised in all the cases where the question is presented, and there is no conflict between the English and American decisions. It cannot be supposed that Mrs. Hitchcock, whose education and pursuits had never made her acquainted with the practical business of life, could within a few months have informed herself of the true situation of an estate so large as that of Judge Hitchcock, which was much embarrassed and its business exceedingly complicated. It is exceedingly probable, too, that she did not know she could claim her dower after she had signed the release on the mortgage of the 16th July, 1838.

But it is contended that the defendant paid to complainant the sum of $150,000 as a part consideration of her deed, and in addition to the sum therein expressed.

If this be so, if so large a sum was received as part of the purchase money, the aspect of the case would be changed, and the deed, in connexion with other acts, might be considered as furnishing evidence of an election that would be binding, unless the parties could be restored to their original situation, by cancelling the deed and refunding the amount paid. (s.) If proof upon this point is to be obtained from the conversations and preparations held and made between the parties, and the verbal agreement concluded previous to the execution of the deeds, there can be no doubt that it was paid as the price of the compromise of the question of usury, and not as part of the purchase money; and that the release and delivery of the mortgaged property to the bank, assignment of leases, &c., were considered the necessary and sure means of securing that object and preventing disappointment. The verbal engagement was, that the bank was to pay him, Erwin, to enable him to compromise and settle certain unsecured debts due from the estate of Hitchcock, the sum of $150,000. That the suit brought by the bank against Hitchcock, to foreclose the mortgage in which he has set up the defence of usury, was to be no further prosecuted, and to stand abated by his death. That suit was to be established by the bank, to foreclose the mortgage, against the representatives of Hitchcock, which was not to be opposed by the plea of usury or any other objection; and a decree to be made without opposition of any kind. That Erwin was to procure from Mrs. Hitchcock a conveyance that

(r) Query. Does not the decree virtually set aside the contract between Mrs. Hitchcock and the bank?

(s) See Pusey vs. Desbourrie, Wake vs. Wake, and Kidney vs. Coussmaker, before referred to.

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would vest a fee simple title in the bank to the mortgaged premises, and also an assignment of the leases and a delivery of the property. And that he, Erwin, would convey and release to the bank the title he had acquired, by purchase at sheriff's sale, to eight stores on Government street. These were part of the mortgaged estate. And further, that the bank would release the estate of Hitchcock and his representatives from the debts specified in the bond and mortgage. R. Griffits Fisher, esq., who was the attorney of the bank in Mobile, and had an intimate and personal knowledge of every thing that occurred between the parties, states that, "prior to the death of the said Hitchcock, I had filed a bill in the chancery court in the first district of the southern division of Alabama, the object of which was to foreclose the mortgage on the said premises. To this bill the said Henry Hitchcock pleaded that a large portion of the debt charged to be due was founded upon usurious considerations, and therefore, to that extent, according to the laws of the State of Alabama, void." After noticing the death of Hitchcock, his will, and the employ of James Erwin by him in his lifetime to negotiate and settle the controversy with the bank, the witness continues, "some time in the latter part of the year 1839, or the beginning of the year 1840, the above named James Erwin had various interviews with the deponent, in which he represented himself to be the fully authorized agent of the complainant, the devisee aforesaid; the object of which interviews was, the final adjustment of the controversy so pending as aforesaid in the court of chancery, between the bank or its trustees, and the representatives of the said Hitchcock, deceased."

Again, says Mr. Fisher, "at this time Herman Cope, then one of the cashiers of the Bank of the United States, came to the city of Mobile, and negotiations were then had between him and the said James Erwin, with a view to the final settlement of the controversy. According to the evidence of Herman Cope, who was one of the contracting parties for the bank, it was agreed between himself and the said Erwin, that the better to carry into effect the said compromise, Mrs. Hitchcock would decline to act as the executrix of the estate, and he, Erwin, would then get his brother Andrew or Isaac, (the witness don't remember which) to become a friendly administrator in her stead, with a previous and distinct understanding between them that the said administrator, when thus appointed, should consent to, and permit, a regular foreclosure of the mortgage of the bank without hindrance from him, or any one else, on behalf of Mrs. Hitchcock." When the witnesses speak of "the controversy so pending as aforesaid," and when they say "with a view the better to carry into effect the said compromise," they certainly have reference to defence of usury set up by Judge Hitchcock; for there was nothing else about those matters of controversy, and nothing else to compromise. From all this nothing can be clearer than that the bank looked to the decree of foreclosure as the best and surest muniment of title to the mortgaged estate; and that the release of Mrs. Hitchcock was desirable to overcome the plea of usury, should it again be interposed. In looking through the bills and supplemental bills in the suit

instituted, in pursuance of the agreement of the parties, it is charged, as stated in the evidence of Fisher and Cope, that the money advanced was in consideration of the compromise.

In the argument of the cause the counsel for the bank assumed the ground, and successfully contended, that the sum of $150,000 paid to Erwin was paid as a consideration of the agreement to waive the plea of usury.

The chancellor thus states the two first grounds assumed for the complainant:

"To maintain the case presented by their bills, the complainants assume the grounds, 1st. That the bond and mortgage, which are the subjects of litigation, were originally lawful and free from the taint of usury.

"2d. That if they are not originally lawful and valid, they have since become so in virtue of the arrangement and new agreement made with the representatives of Hitchcock after his death, and the payment of $150,000 in abatement of the usury."

And in his decree the chancellor, in directing an account to be taken, does not include the money paid in abatement of the usury, but orders the register and master "to take an account, and see what amount is due to the complainants for their debt and interest on their said bond and mortgage." I have before stated that the sum specified in the release of Mrs. Hitchcock, (the debt and interest due on the mortgage,) was equal to the full value of the land she conveyed. There can be little doubt of the correctness of this opinion, when it is remembered that at this period the price of real estate every where had descended almost to the lowest point of depression. The decline was probably not far short of 33⅓ per cent. within the preceding two years, and the price of lands still in a downward direction. In view of this fact alone, it is incredible that the bank would pay for Mrs. Hitchcock's conveyance $150,000 over and above the debt due on the mortgage; and it is still more incredible that, that being the only cash payment, it was not inserted in the deed.

I think, therefore, that the evidence of Fisher and Cope, whose testimony was taken and read in behalf of the bank, and the circumstances referred to in connexion with it, establish beyond reasonable doubt, that this sum was not paid in part consideration of the release of Mrs. Hitchcock, but that it was paid exclusively for the compromise of the question of usury, or, as the chancellor expresses it, "in abatement of the usury." I suppose that it could not be seriously contended, that the compromise by a widow of legal controversy which existed with her husband in his lifetime, would be such an act of election as would bind her to accept the provisions of the will in lieu of her dower.

At most it could be viewed in no stronger light than the payment and receipt of an ordinary debt due the estate. This, however, is not alleged in the answer as an objection to the recovery prayed in the bills, and need not be considered.

But the contract of the parties was reduced to writing in the

solemn form of deeds, and they must be looked to as containing the only legal evidence of their true agreement; for every thing resting in parol is merged in and extinguished by them.

The consideration for which Erwin's conveyance was made is expressed in the deed to be the sum of one hundred and fifty thousand dollars. Parol evidence is offered to show that this was not the real consideration, and that it was inserted only for the special accommodation of Erwin.

Herman Cope's account of the matter is as follows: "The consideration of $150,000, inserted in James Erwin's conveyance or release to the bank for the eight stores mentioned, on Government street, was made by him subsequently to our said agreement for a settlement, and entirely independent of that agreement. The said insertion was assented to by me afterwards, only on the urgent request of the said Erwin, for his own individual accommodation in facilitating, as he then alleged it would, his settlement of the confidential and unprotected debts of the said Henry Hitchcock, before referred to, with which the said bank had nothing to do; and was not in any way to affect, impair, or change in any manner our said agreement, as mentioned in said Erwin's letter to me of the 4th January, 1840, before referred to (*u*). I only yielded to said Erwin's request in the matter for the reasons stated by him, upon the distinct understanding that it formed no part of our said agreement; and for the further reason, also, that Mr. Fisher, the solicitor of the bank, after examining the deed, expressed to me the opinion that no difficulty or disadvantage could arise to the bank for the insertion of that sum as a nominal consideration in the said deed."

This explanation is given by Mr. Cope nearly nine years after the date and execution of the deed. Mr Fisher says, "the said Erwin tendered to this deponent a deed of release or quit claim to the said five (eight) stores, to the said bank, or its trustees; and asked the said deponent what should be inserted in the said deed as the consideration thereof; to which the said deponent replied, that it was a matter of indifference to him, as long as the consideration expressed on the face of the deed was a valuable consideration within statute.

"The said James Erwin then asked this deponent if he had any objection to the stating of the said sum of $150,000 as the consideration, saying that he had an object of his own in doing so; to which this deponent replied, that he did not consider the release worth anything, and was therefore indifferent about the consideration. The sum of $150,000 was therefore inserted in the said release of him, the said Erwin."

It would seem, then, that the said sum of $150,000, agreed to be paid for the compromise, was inserted as the consideration of Erwin's release, but it was the private verbal understanding of the parties that it was not to affect that agreement. This sudden change of the parol contract took place at or about the time the deeds were delivered to, and received by, the respective parties. This was done in the absence

(*u*) The letter was not read in evidence.

of Mrs. Hitchcock, (her deed was delivered by Erwin,) and without her knowledge or consent.

This testimony of Messrs. Fisher and Cope cannot be received for the purposes for which it was offered. No rule of evidence is older or better established than that which prohibits the introduction of parol proof to contradict, or vary, or add to, the terms of a deed. Lord Coke states the true reason of the rule when he says "it would be inconsistent that matters of writing made by advice and consideration, and which finally impart the truth of the agreement of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory. It would be dangerous to purchasers, and all others in such cases, if such rude averments against matters in writing should be admitted." (*w*).

The consideration is as essential to a valid deed, and the rule as to that is as inflexible as it is to any other part of the instrument (*x*). The question whether parol evidence could be received to prove an additional consideration to that expressed in the deed has been seriously contested in England. Eminent judges there have decided that it was inadmissible, unless it was stated "and for other considerations." Lord Hardwick, (*y*) in Peacock vs. Monk, [observes,] "that it would be contrary to the deed; for that when the deed says that it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other." (*a*) The decisions in New York have been invariably the same way (*b*). On the other hand, the case of Villers vs. Beamont (*c*) establishes the rule, that although a consideration as money is expressed, some other additional consideration, not inconsistent with the former, may be shewn.

In that case the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but proof was admitted to show that the instrument was made "as well in consideration of marriage as the said sum of money."

The decision went on the ground that the additional consideration stood with the deed and was not contrary to it. This principle has been recognised in several subsequent cases, (*c*,) and elementary writers, of established reputation, consider it the settled law in England.

Whatever may be the true rule on this subject, the principle is well settled, and I think not disputed, that the parties to a deed will not be permitted to disprove or deny the consideration which they themselves have deliberately agreed upon and inserted. But there is controlling evidence aliunde the deed, which shows that it contains the *the* true contract between the parties, and that it was founded on the consideration therein expressed.

(*w*) Phil. on ev., 424, and note.
(*x*) Shep's Touchstone, 222. 1 Binney, R., 502. Bacon ab. Bargain and Sale, D, &c.
(*y*) 1 Ves., 190.
(*a*) See Clarkson vs. Hanway, 2 P. Will., p. 203; 1 Shep's Touchstone, 222.
(*b*) Howe vs. Barker, 3 John. R., 506; Shemerhorn vs. Vanderhausen, 1 John. R., 139; Margely vs. Haiter, 7 John. R., 341. (c) Q. D., 146.
(*c*) 2 Dyer, 146.
(*c*) See references in Phil. Evid., 425, and 3 Mason R., 259, 347.

By the parol agreement before stated, Mrs. Hitchcock, among other things, was to let the bank into possession of the lands described in the mortgage.

In the release of the trustees of the bank to the estate of Hitchcock it is recited, "that whereas the said Anne Hitchcock has delivered to the Bank of the U. States aforesaid possession of the said lands and houses so devised to her, excepting certain property in Government street, south of the market, now in the possession of James Erwin," &c.

Mr. Cope, in his evidence, states, that with "the release of Mrs. Hitchcock he received the formal delivery of the possession of the property mentioned in said deed." Now, why was this recital in the release of the bank inserted, so contrary to the truth, as Cope states it to be, unless it was to sustain and make it conform to Erwin's deed, and to show that it was a bona fide purchase, and for the consideration stated in the deed.

But still more conclusive is the fact that Erwin's conveyance to the bank is the only written evidence that the $150,000 was paid at all, for any purpose, and it is the only voucher which Mr. Cope can produce for his appropriation and expenditure of this large sum of money.

The deeds all correspond and conform to each other, and the release by the bank seems to have been shaped with a particular design to prevent any doubt or suspicion that the purchase was made from Erwin for the sum expressed in his deed.

And they corroborate the statements made by Mrs. Hitchcock in her answer to the bill filed to foreclose Hitchcock's mortgage.

She says "that the sole consideration for said release or sale was the indebtedness or the supposed indebtedness of her husband's estate to the Bank of the United States, as evinced by the bond and mortgage, and which indebtedness was relinquished and released by Cowperthwaite, Dunlap, and Cope, in consequence of the execution of the said deed by respondent. Said complainant paid her no new consideration, nor was any money advanced or paid to her." If the said sum of $150,000 had been paid to Mrs. Hitchcock, Mr. Cope's character for intelligence, and his known capacity and business habits, forbid the idea that he would have omitted to take her receipt to that effect, as, she being on the spot, it could have been obtained with perfect convenience.

I think, therefore, there is no foundation for the allegation that the money was paid to the complainant as an additional consideration to that stated in her deed, but that it was paid to James Erwin as the purchase money for the eight stores on Government street. On the whole, the *consideration* is, that the complainant is entitled to have her dower assigned in the several parcels or pieces of land described in each bill, with the exception before stated, and accordingly it will be so decreed.

JOHN GALE,
Presiding in C. court, U. S.

At chambers, 5th November, 1849.

Filed 5th November, 1849. JOHN FITTS, *Clerk.*

In the circuit court of the United States, of southern district of Alabama, at Mobile. As of the spring term, 1849.

ANN HITCHCOCK
vs.
JAMES DUNDAS et al.

This cause came on to be heard at the last term, on the bill, answer, pleas, replication, depositions, and exhibits, and was fully argued by the counsel.

All which being duly examined and considered, the court is of opinion that the complainant is entitled to her dower, and to have the same assigned and set off to her.

Whereupon, it is ordered, adjudged, and decreed, that the said Anne have as her dower of the endowment of Henry Hitchcock, her late husband, now deceased, one just third part of the lands, tenements, and hereditaments described as follows, to wit:

1. Three lots, with three four-story brick stores with granite fronts thereon, beginning at a point on the south side of St. Francis street, ninety feet west of Commerce street, thence running west on said street sixty-three feet to the premises of Robertson, Beale & Co., having a depth of seventy-six feet.

2. Also a house and lot on the north side of St. Louis street, between Jackson and Claiborne streets, commencing eighty-seven and a half feet west from Jackson street, thence running west on St. Louis street sixty-eight feet, having a depth of one hundred and ten feet.

3. Also a house and lot situate on the south side of Government street, having a front of one hundred feet on Government street, by a depth of one hundred and fifty feet, commencing sixty-six feet from the southeast corner of Lawrence and Government streets, and thence running east the said distance of one hundred feet on Government street, and known as the "Acre House."

4. Also a vacant lot on the south side of Government street, having sixty-six feet front on said street, running east from the southeast corner of Government and Lawrence streets, with a depth of one hundred and fifty feet

5. Also a vacant lot in the rear of the last named lot, having a front of sixty-three feet on Lawrence street, by a depth of one hundred and sixty-six feet.

6. Also four vacant lots on the north side of Government street, between Hamilton and Jackson streets, having a front of fifty feet on Government street, equal to two hundred and twenty feet, by a depth of one hundred and two feet. And also a vacant lot in the rear of above, having a front of sixty-six feet on Franklin street, by a depth of one hundred and ten feet. Excepting, however, from the said last mentioned five lots, and excluding therefrom, the parcel of land described in the answer of the defendants as the second parcel in the schedule D, and which was recovered by the lessee of Joshua Kennedy's heirs and representatives, of the circuit court of Mobile county, of William Magee, as not being

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in the possession of said defendants, and being situated at the northeast corner of Government and Hamilton streets, fronting on Government street one hundred and ten feet, and extending back on Hamilton street one hundred and twenty feet, as described in said answer, and in the judgment of recovery under adverse title in the said circuit court.

7. Also three lots, including a three-story brick dwelling and outhouses, on the north side of Government street, at the northeast corner of Jackson and Government streets, having a front on Government street of one hundred and twenty feet *feet*, by a depth of equal width, of one hundred and twenty-five feet.

8. Also fifty-four acres of land on the west side of Mobile bay, called and known as "Frescati," bounded on the east by said bay, on the south by lands *by* James Inerarity, on the west by the Dog river road, and on the north by a road leading from the said Dog river road to the bay, with the buildings and appurtenances thereon.

9. Also two three-story brick buildings, with stores underneath, on the north side of Government street, between Royal and Water streets, commencing one hundred and forty-seven feet east from Royal street, and running forty-seven feet east on Government street, with a depth of one hundred and seventeen feet, adjoining the Government street hotel.

10. Also nine lots, twenty-four feet front each, whereon stands the Mobile steam cotton press, with brick cotton sheds, having a front on the west side of Water street [of] two hundred and sixteen feet, by a depth of one hundred and sixty-five feet on Church street, including a steam engine.

11. Also ten lots, of twenty-four feet six inches front each, on the east side of Royal street, between Government and Church streets, having a depth of one hundred and sixteen feet, whereon is a cotton shed of brick.

12. Also ten vacant lots, each twenty-eight feet front on the north side of St. Francis street, between Joachim and Jackson streets, making the whole front of the square two hundred and eighty feet, having a depth of one hundred feet.

13. Also a lot fronting thirty-four feet on Joachim street, by a depth of one hundred and sixty feet, in the rear of the above.

14. Also a lot fronting thirty feet on Joachim street, in the rear of the above mentioned ten lots, between Joachim and Jackson streets, and one hundred and twenty feet deep.

15. Also an entire square, bounded by Royal, Maine, Water, and Massachusetts streets, having three hundred and fifty feet on Royal street, by four hundred and fifty feet on Maine and Massachusetts streets in said city; and a water lot in front of the same, having three hundred and fifty feet on Water street, running to the channel of the river Mobile, with a wharf thereon three hundred and twenty feet by ninety feet.

Excepting, however, from the said square and wharf all that portion thereof which is not held by said defendants under the title of said Henry Hitchcock, as in their said answer is set forth, that is to say, all

that portion thereof which is comprised in the mortgage made by Audley H. Gazzam to William R. Hallett, and which mortgage was assigned to Samuel S. Folwell, and on which a decree of foreclosure and sale was rendered in the chancery court of Mobile county, which portion the defendants do not hold, as they aver, under the title of Henry Hitchcock, but under title paramount.

16. Also a house and lot at the northwest corner of St. Louis and Jackson streets, eighty-five feet front on St. Louis street, by a depth of one hundred and twenty feet.

17. Also a house and lot at the northwest corner of St. Emanuel and Eslava streets, fronting sixty feet on St. Emanuel street, by a depth of one hundred and thirty feet.

The said lands being the lands described in the bill of said complainant, and contained also and described in the said deed of mortgage made by the said Henry Hitchcock, omitting and excepting those three parcels mentioned in the answer of the defendants, as set forth in schedule D, and as to which they disclaim to hold under the title of said Henry Hitchcock.

And it is further ordered and decreed, that the bill be dismissed as to all the other lands and tenements mentioned in said bill, and which are above omitted and excepted, that is to say, as to the said three parcels in said answer set forth, as not being in the possession of the defendants, and is dismissed as to all the claim of the said Anne Hitchcock in her right of dower to the same, or any or either of them.

And it is further ordered, that commissioners be appointed to assign and set off to the said Anne one just third part of the said lands, tenements, and hereditaments, according to their present value, by metes and bounds, if that can be done without prejudice to the same.

And it is further ordered, if the commissioners shall find that one-third part of the said lands, tenements, and hereditaments, cannot be assigned and set off to the said Anne, to be held in severalty by metes and bounds as aforesaid, without inconvenience and prejudice to the parties, then that they inquire, and ascertain, and report to the court the true yearly value and amount of the rents, profits, and income of the said lands, tenements, and hereditaments; that is, of such portion and so much thereof as cannot be held in severalty as aforesaid. And it is further ordered and decreed, that the complainant recover of the defendants her legal costs, to be taxed by the court.

It is further ordered, that the commissioners make their report to the court at the ensuing term, and until then the court reserves the question of damages for the detention of dower.

JOHN GALE,
Presiding judge C. court.

At chambers, 5th November, 1840.

In the foregoing stated case of Anne Hitchcock vs. James Dundas et al., on the application of the defendants an appeal is granted to the next term of the Supreme Court of the United States, on bond being

given in the sum of two thousand dollars, with Sidney Smith as security.

JOHN GAYLE,
Presiding Judge, &c.

Mobile, November 15th, 1849.

Supreme Court of the United States.

JAMES DUNDAS, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, vs. ANNE HITCHCOCK. } On appeal.

Know all men by these presents, that we, James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, and their security, Sidney Smith, are held and firmly bound unto the above named Anne Hitchcock, in the sum of two thousand dollars, to be paid to the said Anne Hitchcock, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this fifteenth day of November, A. D. 1849.

Whereas the above named James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States, for the fifth judicial circuit and southern district of Alabama, in the case of Anne Hitchcock against said James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, on the equity side of said circuit court. Now, therefore, the condition of this obligation is such, that if the above named James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to be and remain in full force and virtue.

JAMES DUNDAS,
MORDECAI D. LEWIS,
SAMUEL W. JONES,
ROBERT L. PITFIELD,
ROBERT HOWELL,
Per SIDNEY SMITH,
Their agent and attorney.
SIDNEY SMITH.

Sealed and delivered in presence of—

The above bond is approved, and the appeal granted as of the last term.

JOHN GAYLE, *Judge, &c.*

15th November, 1849.

Filed this 15th November, 1849.

JOHN FITTS, *Clerk.*